



1           THE ABOVE-ENTITLED MATTER came on for  
2 hearing, pursuant to notice, at the Red Lion  
3 Canyon Springs Hotel, Cedar Room, 1357 Blue Lakes  
4 Boulevard North, Twin Falls, Idaho, commencing at  
5 9:00 a.m. on Thursday, December 16, 2004, before  
6 Amy Horsley, Certified Shorthand Reporter and  
7 Notary Public within and for the State of Idaho.

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## APPEARANCES:

10 For the Department of Environmental Quality:

11           Sonny Buhidar

12 For the Federal Energy Regulatory Commission:

13           Lon Crow, assistant director of licensing

14           Frank Winchell, archeologist

15 For the Shoshone-Paiute Tribes:

16           Donald Clary, attorney with Holland &amp; Knight

17           Tim Dykstra, Fish, Wildlife &amp; Parks

18           Terry Gibson, chairman

19           Robin Harms, CEO

20           Ted Howard, cultural resources

21           ALSO PRESENT:

22 For Idaho Power Company:

23           Shane Baker, archeologist

24           Lewis Wardle, program manager

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## 1 PROCEEDINGS

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MR. WINCHELL: We're here for the Malad hydroelectric power relicensing tribal council meetings with the Shoshone-Paiute Tribes from Duck Valley Reservation. And my name is Frank Winchell, and I am an archeologist with the Federal Energy Regulatory Commission. And with me is Lon Crow, who is the deputy director of the division of hydropower licensing. And basically, we're here to go ahead and listen to the tribe give us additional input on the Malad hydroelectric relicensing, and we're basically here to listen to what the tribe has to say.

This morning we also have some observers. We have -- I'll have you guys go ahead and announce yourselves. We'll start with Lewis here.

MR. WARDLE: I'm the program manager for Idaho Power Company involved in the relicensing for the Malad Project.

MR. BAKER: Shane Baker, Idaho Power archeologist.

MR. BUHIDAR: My name is Sonny Buhidar. I work with the Idaho Department of Environmental

1 Quality here in Twin Falls.

2 MR. WINCHELL: Excuse me, your last  
3 name?

4 MR. BUHIDAR: B-u-h-i-d-a-r.

5 MR. WINCHELL: And of course, the  
6 attendees, as observers, are here just to observe  
7 the meeting and will not be participating in the  
8 discussion, which is between us, the Federal  
9 Energy Regulatory Commission, and the  
10 Shoshone-Paiute Tribe.

11 And with that, I'll go ahead and just  
12 go around the table real fast.

13 CHAIRMAN GIBSON: Yes, sir.

14 MR. WINCHELL: We'll start with  
15 Chairman Gibson.

16 CHAIRMAN GIBSON: My name is Terry  
17 Gibson. I'm the chairman of the Shoshone-Paiute  
18 Tribes.

19 MR. DYKSTRA: I'm Tim Dykstra, director  
20 of Fish, Wildlife & Parks for the Shoshone-Paiute  
21 Tribes.

22 MR. HOWARD: Ted Howard. I'm the  
23 cultural resources director for the  
24 Shoshone-Paiute Tribes.

25 MR. HARMS: Robin Harms, CEO with the

1 tribes.

2 MR. CLARY: Donald Clary, partner with  
3 Holland & Knight, representing the tribes.

4 MR. WINCHELL: Okay, thank you.

5 CHAIRMAN GIBSON: With that,  
6 Mr. Winchell, I would like to ask Mr. Howard to  
7 lead us in a prayer this morning, if we can all  
8 stand.

9 (Prayer given.)

10 MR. WINCHELL: Okay. Well, I guess we  
11 can go ahead and get started. We've had the  
12 prayer.

13 CHAIRMAN GIBSON: Okay. Mr. Winchell,  
14 first of all, I want to thank you guys for  
15 setting this meeting up and making an effort to  
16 come out here.

17 As you know, these issues are very  
18 important to the tribes pertaining to the  
19 facilities that are out there and pertaining to  
20 the actions surrounding those facilities and how  
21 those things are managed and operated so that  
22 they are not detrimental to the nonrenewable  
23 resources that tribes are so concerned with.

24 Also, being Indian people, we're the  
25 ones that have to speak for the animals. And we

1 speak for the fish, all the animals that are  
2 affected by dam operations and different things  
3 that go on with the fluctuation and drawdown  
4 status and those types of things. And we're very  
5 much concerned about that.

6 As you may or may not know, our tribe  
7 was one of the lead entities in helping to  
8 establish -- helping the Commission to establish  
9 the overall Indian policy that we're dealing  
10 with. And it's something that is very important  
11 to us, and we are very much concerned about how  
12 the policies and procedures are being applied and  
13 making sure that our concerns are being addressed  
14 and the concerns of the overall public, you might  
15 say.

16 We truly feel that we are not part of  
17 the public. We are a separate sovereign entity,  
18 and we expect to be dealt with in that fashion,  
19 as a sovereign nation. Our comments and things  
20 like that, I think, are on a little higher level  
21 than what the general public's concerns would be,  
22 being that we are dealing with the facilities  
23 that are in our aboriginal territories, areas  
24 that aboriginal title has not been extinguished.  
25 And so we're very much concerned with that.

1           A lot of people within the power entity  
2           and the Commission itself, and others that are  
3           involved, always try to tell me that, Well, you  
4           don't have an established treaty right or any of  
5           those things. We have two unratified treaties  
6           that deal with these areas: The Boise Valley  
7           Treaty and the Bruneau Valley Treaty.

8           However, those treaties went  
9           unratified, no fault of our own. We still abide  
10          by those treaties, and we still utilized those  
11          traditional fishing areas and hunting areas that  
12          were reflected within the treaties. Up until the  
13          1950s, when the Hells Canyon Complex was  
14          developed, we still fished in all of these areas.  
15          And with the establishment of the dams, it  
16          eliminated that opportunity for us.

17          And also, with the establishment of  
18          those dams -- I know we're specifically talking  
19          about the Malad Project, but I need to tie these  
20          other issues into it because they are relevant as  
21          to what is going on up here.

22          The areas that we're talking about are  
23          extremely important to the tribes, not only the  
24          cultural resources and those things, but the  
25          economic resources that we had. Things that

1 we -- areas that we utilize for subsistence and  
2 economic gain are no longer because of these dams  
3 and because of the actions of the power company  
4 that have eliminated those opportunities and  
5 violated those opportunities that we enjoyed. We  
6 still have -- under reserved rights, we still  
7 have -- those opportunities should still be  
8 available to us.

9 I've been very concerned with how the  
10 process has moved forward with the private  
11 entity, meaning Idaho Power, not having to pursue  
12 consultation. It's my understanding that Idaho  
13 Power did make an attempt to come out and get an  
14 ethnographer, an archeologist, and these people  
15 on board to determine the importance of these  
16 areas and those types of things.

17 However, the ethnographer that was used  
18 at the time did a very incomplete job of  
19 gathering information and trying to determine the  
20 importance and significance of these areas  
21 because they -- when you go to the tribes,  
22 information pertaining to cultural resources,  
23 which you folks call cultural resources, is  
24 something that has been kept very secret within  
25 our tribes because of past history and how

1 anything that we had revealed and anything that  
2 we document is exploited.

3 And it's used in a way that's very  
4 detrimental to the continuation of our tradition  
5 and our culture. And I think it's something that  
6 we need to address here as to how we need to  
7 proceed in the future as to identifying these  
8 things of great importance.

9 I was very disturbed with the  
10 collaborative process that was laid out for  
11 everybody to follow, including the tribes. We  
12 were all lumped together. Everybody was lumped  
13 into one group. In these collaborative meetings  
14 that took place, there was never any action that  
15 was taken on those issues that we had identified  
16 within that process. It was a process that I  
17 feel was just going through the motions. It went  
18 through the motions to try to determine the  
19 importance and significance of the areas.

20 I'm a little disappointed that the  
21 upper echelon, you might say, of the Commission  
22 is not here. I am the leader of my nation, and  
23 I'm here, and I wish the leader of the Commission  
24 would have been here today or those people that  
25 have the decision-making capacity would have been

1 here today.

2 One of the real concerns that I had  
3 with how this thing has manifested itself is  
4 there was programmatic agreements that were  
5 developed, I believe, by FERC or by Idaho Power  
6 Company that were floated out there. And the  
7 federal agency signed onto these programmatic  
8 agreements, which in my mind, and I think our  
9 legal expertise will support, that those  
10 programmatic agreements are totally, for lack of  
11 a better word, bogus, because consultation did  
12 not take place.

13 The federal entity does not have the  
14 ability to consult. It's FERC's obligation and  
15 duty to make the federal agencies that have the  
16 authority in these areas surrounding the  
17 reservoir, surrounding the dam, and these places,  
18 to consult with tribes.

19 Well, we never did have no -- there was  
20 never an initiation of consultation from those  
21 federal agencies. The only thing that we seen  
22 come across our desks was a programmatic  
23 agreement that they invited us to concur with,  
24 stated fictitiously, that consultation had  
25 occurred, and we wish the tribes to concur with

1 this. And those things never happened. The  
2 consultation never did take place on that.

3 So in my mind, we're just getting  
4 started here. We're only getting started here  
5 because this is only the second consultation  
6 meeting that we've had with FERC. And in my  
7 mind --

8 MR. CLARY: Chairman, I think we didn't  
9 have one for Malad previously.

10 CHAIRMAN GIBSON: No, we didn't have  
11 one at all for Malad. I'm speaking to the  
12 previous consultation meeting that we had --

13 MR. CLARY: On Hells Canyon.

14 CHAIRMAN GIBSON: -- on Hells Canyon.  
15 And that was the only one that ever took place.  
16 The license was approved and everything for C.J.  
17 Strike, where we had filed a motion to intervene.  
18 That was granted. However, the process moved  
19 forward without us being able to apply our  
20 concerns and things of importance in those areas.

21 Those things never did happen. And so  
22 it leaves us behind the eightball, where we've  
23 never been afforded the opportunity to  
24 participate at a level that would have been --  
25 that would have brought out the importance of

1       these areas and the concerns that the tribes had.

2                 We're only starting from square one.

3       We can't sit at the table here today and discuss  
4       site-specific information and those types of  
5       things because the process itself hasn't started.  
6       And so we're very much concerned about how this  
7       thing is moving forward. You know, it's moving  
8       forward in a way of after the fact, you might  
9       say.

10                And I think, Mr. Winchell, you and I  
11       had a conversation where you had asked me to sign  
12       onto these programmatic agreements, and you would  
13       assure me that consultation would take place  
14       after those agreements were signed onto. And I  
15       think that's a very backwards way of looking at  
16       it and trying to follow the law and the policies  
17       that are set out there that establish -- that are  
18       established for participation of tribal entities  
19       to be involved. It very much concerns us.

20                I know that my tribe had agreed to  
21       certain things within Idaho Power to use an  
22       ethnographer and these types of things. However,  
23       the ethnographer that was used was not -- did not  
24       access the proper people that had the  
25       information, the people that are the keepers of

1 the tradition, keepers of the religion, keepers  
2 of all of the sacredness of these areas, simply  
3 because nobody knew the guy. The elders don't  
4 know the guy, so they're not going to reveal  
5 information to them.

6 At that time, the archeologist, Mr.  
7 Mark Druss, was at a collaborative meeting, and  
8 he said that the information gathering for the  
9 ethnographic studies and stuff was complete and  
10 those things were all done. I asked him at that  
11 point in time, When will I be able to apply my  
12 religious overview and traditional religious  
13 concerns and usage concerns to these areas? And  
14 he told me at that time that he had already done  
15 it for me; it's all been taken care of, he'd  
16 already done it, that he'd applied the religious  
17 overview.

18 And I can't -- it's beyond my  
19 comprehension how he can apply my religious  
20 concerns and things that are important to my  
21 tribe culturally and traditionally and  
22 religiously to these areas when he is not a  
23 member of my tribe. He's not an Indian. He  
24 doesn't know anything about my culture at all.

25 So there's a big chunk that's left out

1 of that. That's why I say it's wholly  
2 incomplete. I'm not sitting here saying that,  
3 you know, this guy is a terrible man, you know,  
4 he was worthless and didn't do a good job. Maybe  
5 he did the best that he could. But the fact of  
6 the matter is, we've never been able to apply the  
7 issues that pertain to the American Indian  
8 Religious Freedom Act, Executive Order 13007.

9 All of the relevant acts pertaining to  
10 environmental justice, issues pertaining to ARPA,  
11 you name it, the whole laundry list of policies  
12 and Congressional mandates that have been handed  
13 down have not been applied to any of these areas,  
14 simply because once the ethnographer was done,  
15 and in my view, in the eyes of Idaho Power, they  
16 felt their job was complete.

17 And that is not true. We have not had  
18 the opportunity to go out there with Idaho Power  
19 Company and make a determination as to the  
20 significance of intangible things, as to the  
21 significance of areas of great importance that,  
22 as Mr. Howard stated, are used contemporarily.  
23 And it's been approached in a way that prehistory  
24 has been applied.

25 And see, that's where we had a real

1 breakdown, because tribes don't have prehistory.  
2 It's all history. It's only since Lewis and  
3 Clark came out here that they started reporting  
4 and documenting information, that they draw the  
5 line there and say that this was prehistoric, and  
6 from here on, this is historic.

7           And so by applying just the archeology  
8 to these areas, it greatly diminishes the tribes'  
9 ability to participate and the tribes' ability to  
10 identify the importance and significance to these  
11 areas, simply because the archeology in these  
12 areas is no longer there. Twenty years ago, if  
13 you came out here -- and I don't know how long  
14 this gentleman's been an archeologist or if he's  
15 even been in this area.

16           Twenty years ago, if you came out here,  
17 you would have found thousands of arrowheads,  
18 thousands of spearpoints, weights for netting,  
19 and all of these things. You would have found  
20 all of those things out there. Well, in the past  
21 20 years, people have found all those things, and  
22 they've collected them all up.

23           So if you just apply archeology to try  
24 to satisfy the National Historic Preservation  
25 Act, that in itself completely erodes the tribes'

1 ability to participate at a level that we need to  
2 participate, because those things are gone. A  
3 "stones and bones" approach that's taken is  
4 something that is not sufficient to identify  
5 these areas and to identify all of these things  
6 that are out there.

7           And so it very much concerned me,  
8 Mr. Winchell, when we discussed the programmatic  
9 agreement and asking me to sign off on it when  
10 this consultation hadn't taken place, simply  
11 because without the consultation, the power  
12 company has absolutely no idea and FERC has  
13 absolutely no idea of the importance of these  
14 areas because only archeology is applied.

15           So whenever you go to any of these  
16 areas now, the reports indicate lithic scatter,  
17 lithic scatter, one over here, two flakes over  
18 here, five flakes, lithic scatter, lithic  
19 scatter. And so that's what's reflected in the  
20 documents, is just lithic scatter and simple --  
21 maybe a broken arrowhead here or something that  
22 the looters or collectors left. And so the tribe  
23 isn't allowed to participate at a level that  
24 would identify things of importance.

25           And I think you have to apply Bulletin

1 38 of NHPA to these areas. Bulletin 38 is a  
2 document that helps identify traditional cultural  
3 properties. And at this point in time, the  
4 application of Bulletin 38 is one of the only  
5 mechanisms out there that is going to allow the  
6 tribes to participate at a level that's going to  
7 be meaningful and that's going to satisfy our  
8 concerns and our needs, and it's going to satisfy  
9 the documentation that Idaho Power is going to  
10 need to submit for the approval of the license.

11 And I tried time and time again to get  
12 Mr. Druss to take this approach, and he would  
13 never acknowledge it. He would never, ever,  
14 agree that maybe we should take a look at this,  
15 maybe we should try to apply Bulletin 38 and see  
16 what the chairman is talking about as it pertains  
17 to identification of sites. Because through  
18 Bulletin 38, you'll identify burial sites, you'll  
19 identify sacred sites, areas that are used for  
20 religious purposes.

21 And so that's where there's a big hole  
22 in this whole thing, a huge hole in this whole  
23 thing, because the tribe has not been allowed to  
24 apply what we are concerned with or being able to  
25 participate to identify what we're concerned with

1 to put -- to be able to determine the  
2 significance of those sites and to determine the  
3 importance of those sites as per the religious  
4 usage of it and as per the intangible things that  
5 may be there that no archeologist can identify.

6 There is absolutely no archeologist in  
7 this country that can identify traditional  
8 cultural properties as per -- as to the  
9 importance it is to the tribes. They can't do  
10 that because they're only identifying stones and  
11 bones. And with them no longer there, it leaves  
12 that big hole to where the tribe hasn't been able  
13 to participate and determine the significance of  
14 those areas.

15 And that's something that we need to  
16 fix, you know, along the lines of not being able  
17 to identify those areas in a manner that's going  
18 to be satisfactory to the tribe and, I would  
19 hope, satisfactory to the power company, that  
20 that be allowed to happen, because we're not here  
21 to try to stand in the way of the power company  
22 of getting its license. We're not here to try to  
23 bankrupt a company.

24 We're here to try to assist the company  
25 in producing power at a rate that's not

1 bankrupting the community and the people as a  
2 whole. We're here to try to protect our  
3 interests and to protect those things that are  
4 supposed to be managed and protected by federal  
5 law. That's all we ask. We don't go over and  
6 above or outside of the law.

7 We ask that we participate and be able  
8 to identify things to where those things that are  
9 left there that are so important to us will have  
10 a continuation, and they will continue on, and  
11 they will be able to be utilized by myself, by my  
12 children, my great grandchildren.

13 I would like for my granddaughter I had  
14 today to be able to go out to a site that is  
15 there because the Federal Energy Regulatory  
16 Commission, in coordination with Idaho Power  
17 Company and the tribe, was able to identify the  
18 significance of an area and the importance of a  
19 religious usage of an area, and it's still there  
20 because we applied the laws properly, because we  
21 applied the policies and procedures properly, and  
22 so it's -- this nonrenewable resource is still  
23 there, and it's going to continue on as per the  
24 law as mandated by Congress.

25 And so these are the things that we're

1 very much concerned with. And you know, we've  
2 always stated that we want a partner -- as a  
3 leader of my tribe, I believe in developing  
4 partnerships. I don't like to be in an  
5 adversarial mode and trying to butt heads with  
6 anybody that comes along.

7 And you have to realize that we deal  
8 with federal agencies day in and day out, from  
9 one end of the spectrum to the other. And  
10 they're all here to help us, but when it gets  
11 down to reality, they're there to do a certain  
12 job, and it's to get an end result.

13 Well, we've we've always taken the  
14 position that we are here to participate to help  
15 these agencies and entities meet their time  
16 frames and to meet the things they need to do.  
17 However, they have to do it in a way that's  
18 consistent with the law and that's consistent  
19 with protecting those things that need  
20 protection, because they are nonrenewable. And  
21 once they're gone, they're gone.

22 And so it's very important that we go  
23 back to that, and that we be able to apply those  
24 relevant acts that are there to protect these  
25 things, and that we're able to participate at a

1 level that's going to allow the private entity  
2 and the Commission to make a decision that's not  
3 going to be detrimental to those things that --  
4 very few things that are left. And it's so  
5 important that we have that opportunity to do  
6 that and we have that opportunity to be able to  
7 protect those things.

8           And that's why we're here today. And  
9 like I said, we're not here today to speak of  
10 site-specific things. We're not even to that  
11 point yet. We're still here talking about the  
12 process and how it's laid out and how best to go  
13 from here to assist the power company in getting  
14 their license.

15           On the other hand, we're here to  
16 protect those things that are so important, and  
17 mandated by federal law to protect, and assist  
18 the Commission in making its decision a proper  
19 decision by utilizing all of those tools that I  
20 laid out in making that decision.

21           And that's, basically, what our purpose  
22 here for today is. I'd like to ask Mr. Don Clary  
23 if he would follow up on that.

24           MR. CLARY: Thank you, Chairman. And I  
25 think you covered very well the historical

1 cultural areas. I'd like to also add that --

2 CHAIRMAN GIBSON: I've got to get this  
3 call, guys, that came in.

4 MR. CLARY: -- similarly, the tribe has  
5 stated in its filings, thus far, that the project  
6 has had an enormous impact on the general health  
7 of the tribe and, as a result, primarily the  
8 completion of fish stocks. And in our filing,  
9 the tribe noted that it's led to diabetes and  
10 increased in mortality amongst tribal  
11 populations.

12 And I think, hopefully, you're aware of  
13 the consultation policy that the Commission has,  
14 which acknowledges that the Commission has laid  
15 both a fiduciary and trust relationship with the  
16 tribes. We believe it's a very strong obligation  
17 that should be implemented. We look to the  
18 Commission to protect the interests of the  
19 tribes. And we have found it very difficult to  
20 understand how, after stating what we feel to be  
21 a very clear and apparent truth, that fish stocks  
22 have dropped dramatically since the integration  
23 of this and other projects in this area.

24 And there's a direct correlation to the  
25 diminished health of tribal populations, indeed,

1       increased diabetes and mortality. We find it  
2       very difficult that anyone or any agency who is  
3       in a fiduciary or trust position would allow  
4       tribal populations to, in effect, die without  
5       pursuing this line of inquiry to see if there  
6       really is an impact upon the tribal populations.

7               We believe it's very clear and that  
8       there should be an interest on the part of the  
9       Commission pursuing this approach. Instead,  
10      looking in the EA, we see that, basically, the  
11      Commission takes the position that since no  
12      evidence was provided, even though, by the way,  
13      we did request studies be done in this area, that  
14      they flatly dismissed this concern.

15              We feel that's one of the more  
16      difficult things to understand in this process.  
17      And we particularly find that it's difficult  
18      when, under the Commission's own policies, there  
19      is an obligation to engage in government-to-  
20      government consultation on issues which are  
21      raised by the tribe.

22              No consultation took place on these  
23      discussions -- I'm sorry, on these points with  
24      regard to the health and welfare of the tribe.  
25      Similarly, no consultation ever took place in the

1 way the term should be truly used, government-to-  
2 government consultation, on the historical  
3 issues. Indeed, this is the first time, we  
4 believe, that we might even be engaged in a  
5 discussion with the Commission on this topic  
6 that would be anything close to what we  
7 characterize as government-to-government  
8 consultation.

9 And that's particularly difficult to  
10 understand why that should be happening now, when  
11 the Commission has now promulgated what it  
12 purports to be a final EA on the project. And  
13 we're having great difficulty understanding what  
14 we would have to state today in this meeting that  
15 might cause a different result than that directly  
16 with regard to these topics in the EA, final EA.

17 And I guess we would like you to  
18 express, is that something that's possible or  
19 not? We need to know this since it's been the  
20 Commission, not the tribe. The tribe has  
21 consistently requested government-to-government  
22 consultation on each of these projects at every  
23 stage of this proceeding.

24 So we'd like to know, how is this going  
25 to be dealt with? And is there a possibility,

1 going forward, that some of these concerns can be  
2 addressed? Would you respond to that?

3 MR. CROW: Yeah, I'll address a couple  
4 of the different points that have been made by  
5 both of the speakers.

6 One is what's happening as far as the  
7 protection cultural resource sites, pursuant to  
8 this action, that the Commission takes a final  
9 action on, of what will happen once the license  
10 is issued, and then the latter point, as far as  
11 whether or not the Commission's EA is of  
12 sufficient scope to encompass all the issues that  
13 you brought forth, including what you just  
14 mentioned.

15 MR. CLARY: Right.

16 MR. CROW: In regard to the first  
17 issue, being what's going to happen with the  
18 implementation of the EA, is basically what the  
19 chairman is pointing out. And I think there's a  
20 couple of things that we need to look at  
21 macroscopically. And that is, there's been  
22 various roles for the tribes and other interested  
23 parties to be involved on the prefiling  
24 consultation when the application was put  
25 together, once the application comes in the door.

1           And the tribes have been very involved  
2           in that, and the record is very clear what your  
3           issues have been all along the way. And we very  
4           much appreciate your involvement there.

5           But there also has to be a realization  
6           that once the Commission takes final action on  
7           the application, if they decide to issue a  
8           license, ultimately, the protections and the  
9           enhancements that are going to be realized on the  
10          ground are going to be realized through the  
11          implementation of all of these different  
12          measures, measures that are designed to protect  
13          the fish, enhance fish, protect wildlife, enhance  
14          wildlife, and also to protect cultural resource  
15          sites out there.

16          If the Commission issues a license and  
17          they issue the -- they approve the programmatic  
18          agreement that's part of it, there is a provision  
19          for the tribes to be engaged in that postlicense  
20          activity that will allow for some fine tuning and  
21          additional work to be done, the details of which  
22          I will let Frank provide some description of.

23                 MR. WINCHELL: Yes. I'd like to  
24                 address that at this point because I think it's  
25                 important to know that we did consider the

1 comments from the tribes with a lot of weight.

2 And because of those comments on the  
3 draft programmatic agreement, especially on the  
4 draft management plan, which will be the end  
5 product of what Idaho Power proposes to do for  
6 the new license, we didn't issue it as a final  
7 historic properties management plan, knowing that  
8 there could be a great opportunity,  
9 postlicensing, to go ahead and give that  
10 additional information to Idaho Power to manage  
11 traditional historic properties pursuant to  
12 Bulletin 38.

13 So that's what we would like to see, is  
14 that when the opportunity -- if the Commission  
15 decides to issue a new license for this project,  
16 that Idaho Power will certainly go back, as we  
17 have directed them through our response with  
18 the -- along with our final programmatic  
19 agreement, is to go ahead and get the tribe to  
20 give us or give Idaho Power that additional  
21 information on things that they know of that were  
22 not picked up within the project or that could be  
23 integrated within the traditional cultural  
24 property perspective, that that can be done  
25 appropriately through the management plan.

1                   And that management plan would not be  
2                   completed until a year after the license was  
3                   issued. So there would be that additional  
4                   opportunity for close consultation that would  
5                   really outline exactly what the tribes' concerns  
6                   were with that management plan. And all of that  
7                   could be addressed.

8                   MR. CLARY: Let me ask you, though, for  
9                   clarification. As you know, the tribe has  
10                  consistently, and has done so on other  
11                  proceedings as well, requested extensive  
12                  ethnographic studies be completed so that sites  
13                  could be identified.

14                 MR. WINCHELL: Right.

15                 MR. CLARY: Okay. Our concern with  
16                 that solution, which you're proposing here at  
17                 this point in time, is that as it's characterized  
18                 as a management plan, we basically would be in a  
19                 position where whatever had been identified,  
20                 which we clearly have stated is truly inadequate,  
21                 if we're managing that inadequate sample base, or  
22                 whatever you want to state, that's problematic  
23                 for us.

24                 If you're suggesting that,  
25                 postlicensing, there could be an ethnographic

1 study completed so that what we feel are very  
2 obvious flaws are corrected, that might be  
3 something that might be worth considering. Which  
4 is it, I guess? Am I making myself clear?

5 MR. WINCHELL: Well, we, more or less,  
6 left it open-ended. In other words, what we  
7 wanted to see was continued input from the tribe  
8 on finalizing the management plan. I think the  
9 scope of the project is that -- and correct me if  
10 I'm wrong on this, because there was only one  
11 aboriginal site that did get identified there  
12 within that two-mile stretch.

13 Okay. For me, the most -- if, really,  
14 the goal is to preserve and protect historic  
15 properties, vis-a-vis identifying traditional  
16 cultural properties, and what Chairman Gibson was  
17 saying about, you know, having that perpetuate  
18 for the life of the new license, it seems the  
19 clearest way to get at that kind of information  
20 is to ask the tribe directly, what else is there  
21 that they need to incorporate within that  
22 management plan?

23 So that is the way that -- I would  
24 think that would be the most expedient way to  
25 really identify there are traditional cultural

1 properties there, to go ahead and give that  
2 information now.

3 MR. CLARY: So that could include the  
4 conducting of additional ethnographic studies?

5 MR. WINCHELL: It could. But keep in  
6 mind, it has to be with the scope of the project,  
7 as opposed to, let's say, the entire Snake River  
8 Basin. But if there was some ability to get  
9 additional information that Idaho Power would  
10 engage with, which I think would be appropriate  
11 to go ahead and finalize that plan, yes, there  
12 could be some additional ethnographic studies  
13 that would be helpful.

14 MR. CLARY: Could there be language  
15 stated in the license conditions, or what have  
16 you, indicating that one of the things to be  
17 considered during this management program would  
18 be the potential of completing ethnographic  
19 studies?

20 MR. WINCHELL: I think it's possible.  
21 I can't -- since, you know, we're going to  
22 present this before the Commission to make their  
23 decision on it, and that will be through the  
24 license order, I would think it probably would be  
25 best to go ahead and put that in the management

1 plan because the management plan is actually the  
2 document that will say, this is what Idaho Power  
3 will do for the term of the license.

4 And I think it would be a better place  
5 to put a proposed study, of whatever scope it's  
6 determined to be, for things that will be carried  
7 out through the management plan.

8 MR. CROW: And the tribes would have an  
9 opportunity to have input into the formulation of  
10 that management plan, ultimately.

11 MR. WINCHELL: Absolutely.

12 MR. CROW: But there is the ultimate  
13 test that we have to keep in mind, and that is,  
14 there has to be a nexus between the project and  
15 the kinds of work and studies that are being  
16 undertaken.

17 MR. CLARY: Yeah. I want to make clear  
18 that the tribe has never taken the position that  
19 there shouldn't be such a nexus. I mean, we  
20 understand that this is a single license that's  
21 being obtained.

22 MR. CROW: Okay.

23 MR. CLARY: And I would suspect,  
24 however, the one thing that we might differ on  
25 would be the extent of what the project is going

1 to be. Sometimes you get a quicker way; we might  
2 believe that, perhaps, there might be some  
3 impacts from this project. But that's to be  
4 worked out between the parties, I would assume.

5 Sorry, could we go off the record for a  
6 moment? Would that be okay?

7 (Break taken.)

8 MR. WINCHELL: All right. And as we  
9 were talking with the Don Clary -- this is for  
10 Chairman Gibson's knowledge -- that we feel that  
11 what Chairman Gibson was talking about in  
12 applying clarity, can certainly be done with the  
13 finalization of the management plan and that, you  
14 know, if there are additional ethnographic  
15 studies or some kind of focusing on trying to get  
16 more information on these traditional cultural  
17 properties that could be there, then that  
18 certainly would be appropriate to go ahead and  
19 put into the management plan.

20 But again, we feel that we have taken  
21 the tribes' considerations, in what they have  
22 submitted to us in writing, very seriously. And  
23 that is a key reason, if not the principal  
24 reason, why we went ahead and allowed for  
25 additional modifications to the management plan

1 to be done.

2 I'd like to add something else along  
3 these lines, is that in the programmatic  
4 agreement, there is a dispute resolution clause  
5 that does allow the Commission to go ahead and  
6 step in at a time after the license has been  
7 issued. And during this time that the management  
8 plan, historic properties management plan, would  
9 be finalized, is that if there is dispute between  
10 Idaho Power and the tribes, then the Commission  
11 can certainly step in and try to resolve that  
12 dispute.

13 And then further along that, if need  
14 be, we can get other players, such as the  
15 Advisory Council on Historic Preservation, who is  
16 a key moderator in these kinds of consultations,  
17 vis-a-vis Section 106 of the National Historic  
18 Preservation.

19 So again, we feel that the  
20 management -- there certainly is a lot of room in  
21 the management plan to go ahead and specify  
22 additional language, additional processes that  
23 would accommodate the tribes' concerns on making  
24 sure that traditional cultural properties are  
25 identified and taking the right measures to

1 preserve and protect those properties.

2 MR. CROW: Any other questions about  
3 the implementation of the EA?

4 MR. CLARY: Well, how about this  
5 question, which we have with regard to the health  
6 impacts of the project? Is there any way that  
7 that could be addressed?

8 MR. WINCHELL: I'm sorry, I couldn't  
9 hear.

10 MR. CLARY: With regard to the health  
11 impacts project on the tribe, how was that  
12 perceived? How did the Commission -- I guess  
13 what I'd like to know is, how did the Commission  
14 consider its fiduciary and trust obligation to  
15 the tribe when it reviewed those issues and came  
16 to the conclusion, apparently, that nothing was  
17 to be done about that?

18 MR. CROW: You know, as the tribes have  
19 been fully engaged in the process -- and they  
20 have been -- it's been made clear as to what your  
21 feelings are regarding this issue, that you feel  
22 that a more expansive analysis needs to be  
23 undertaken. And the Commission staff, in their  
24 final assessment, responded that they felt it was  
25 beyond the scope of the particular ongoing

1 impacts of the project.

2 Ultimately -- and I have to make this  
3 clear -- it's the Commission staff that has made  
4 that call. The Commission is free, when it takes  
5 final action on the license for application, to  
6 do any number of things.

7 They can direct the staff to go back  
8 and revisit the issue; they can establish an  
9 additional record, or they can say the sufficient  
10 record is in place and issue the license with  
11 conditions that may address the concerns that you  
12 have; or they may say that the staff's responses  
13 are sufficient; they may agree with the staff's  
14 responses so that they'll not include additional  
15 requirements on the license.

16 So there's three ways that it can come  
17 out. The tribes have made it clear what their  
18 positions are. The staff has made it clear what  
19 their responses to those issues are. Now it's up  
20 for the Commission to make a final determination.  
21 If you feel that, in this forum, you can add  
22 additional evidence in support of what would be  
23 undertaken, we certainly would urge you to do  
24 that now.

25 MR. CLARY: Well --

1                   CHAIRMAN GIBSON: Mr. Clary, I think  
2                   that something that definitely needs to be  
3                   addressed in this, when we're looking at impacts  
4                   to the tribe itself, regardless of the position  
5                   that certain entities take that you don't have a  
6                   treaty right or you don't have any established  
7                   right off reservation, we still hold aboriginal  
8                   right. And when you look at aboriginal right,  
9                   aboriginal right is stronger than a treaty right  
10                  because that right has not been negotiated down;  
11                  it has been negotiated away.

12                  What Mr. Clary's talking about  
13                  pertaining to the health impacts to the tribe are  
14                  very important because the actions that the power  
15                  company took on the river have been very  
16                  detrimental to what is happening on my  
17                  reservation at this point in time because those  
18                  actions eliminated that fish run to my  
19                  reservation.

20                  And the power company takes the  
21                  position that, well, that was the -- those  
22                  impacts were caused by reclamation. That's one  
23                  part of it. That's one piece of it. However,  
24                  the executive order that established the  
25                  expansion of the reservation into Idaho was

1 specifically expanded to include what's called  
2 Pahsimeroi Watershed to provide the Petticoat  
3 band of Paiutes with a salmon fishery.

4 And so with that executive order  
5 establishing that, and then the actions of the  
6 power company that they took on the river, it  
7 eliminated that. So it eliminated that salmon  
8 run that was established by the executive order  
9 signed by the president.

10 MR. CROW: Well, I fully appreciate  
11 where you're coming from. There's a couple of  
12 things which I'll reiterate. And that is, there  
13 needs to be a nexus between the action that the  
14 Commission will, ultimately, make and what you're  
15 requesting. The Commission staff, in the  
16 environmental assessment, did, I think you will  
17 acknowledge, address fish passage in the proposal  
18 as a way to enhance the fisheries that are there.

19 It didn't -- and as it's stated in the  
20 environmental assessment, what you have to  
21 understand, and the tribes actually acknowledge  
22 this in their comments, is that we look at the  
23 ongoing operation of the project. We don't look  
24 at preconstruction effects. That policy has been  
25 supported by several different court cases in our

1 favor, uniquely.

2 But I guess, having said all that, and  
3 when you look at the ongoing impact evaluation  
4 that we did, and using this ultimate test of  
5 nexus between what's being asked and what we  
6 evaluated, you'll find a result, although  
7 unsatisfactory to the tribes at least, staff call  
8 on whether or not it's necessary in order to take  
9 that kind of analysis.

10 MR. CLARY: If I can just respond  
11 briefly to that?

12 MR. CROW: Sure.

13 MR. CLARY: Yeah, I'm aware of previous  
14 decisions; however, I'm also aware of the fact  
15 that the Commission has now adapted its  
16 consultation policy, which basically would  
17 require a consultation in these types of  
18 situations. And our position has been that this  
19 is not taking place.

20 We also plead consultation has to be  
21 meaningful. At the end of the time after having  
22 the EA submitted, we were saying, What are you  
23 thinking about? There actually has to be input,  
24 and it has to be meaningful for the tribes, where  
25 they are allowed to develop positions and there

1 are responses put to us by the appropriate  
2 agency.

3 And in addition to that -- and we don't  
4 believe that's happened in this instance. And in  
5 addition to that, we also believe that in the  
6 policy, clearly it's been acknowledged now, We  
7 believe we always had a fiduciary and trust  
8 obligation to the tribe. And I come back to  
9 that. There's not something that's as much -- I  
10 can't imagine anything, other than the lives of  
11 its members, that's more important to the tribe.

12 And this impacts the lives of its  
13 members. And if the Commission has an  
14 obligation, a fiduciary or trust or otherwise, to  
15 the tribe, we believe that it had an obligation  
16 to at least explore this and give a very good-  
17 detailed reason why such studies were not  
18 appropriated.

19 MR. CROW: Yeah, I acknowledge that,  
20 unfortunately, in this case, the government-to-  
21 government consultation didn't occur until after  
22 the record may have been closed in this. And I  
23 apologize. That should have been done earlier.

24 However, you also have to understand  
25 that, you know, the policy statement was just

1 recently issued, and we've been evolving the  
2 policy as we are engaged in various licensing  
3 processes. So our policy is, generally, to get  
4 involved before we start doing the process, as  
5 you all know, and has happened on the Hells  
6 Canyon Complex.

7 So I do apologize for the fact that  
8 we're kind of late in this proceeding, but you  
9 also have to understand that we have 100  
10 different proceedings that were in various  
11 stages. And what we're trying to do is, as those  
12 are coming through the door, make sure that we  
13 undertake this government-to-government  
14 consultation early in the process.

15 And ultimately, what the goal is in  
16 this government-to-government consultation, is to  
17 ensure, number one, that the tribes are fully  
18 engaged in this process. And actually, you guys  
19 have been fully engaged in the Malad relicensing  
20 process. But that's the goal -- to date, the  
21 goal of the Commission's implementation of the  
22 policy statement has been to ensure you guys are  
23 fully engaged in this process.

24 CHAIRMAN GIBSON: Question here real  
25 quick, excuse me. If you're not -- the

1 Commission isn't here to deal with past problems  
2 or effects --

3 MR. CROW: Preconstruction.

4 CHAIRMAN GIBSON: -- preconstruction  
5 effects, what exactly is your purpose, then?

6 MR. CROW: What the Commission does  
7 when it looks at a relicense for an Idaho  
8 project, is it looks at the ongoing effects of  
9 the project, not, for example, whether or not  
10 creation of a reservoir inundated the bottom of  
11 the -- or preconstruction. It looks at what the  
12 ongoing effects are and future effects.

13 And in this case, they looked at the  
14 ongoing effects, which was -- one of the effects  
15 is fish passage. And as the staff has  
16 recommended in the document, they have called for  
17 the construction of a fish passage facility,  
18 along with additional studies and monitoring.

19 CHAIRMAN GIBSON: And so when we're  
20 looking at ongoing effects, as Mr. Clary has  
21 stated, we're looking at health effects. And  
22 now, will that be incorporated into it and  
23 addressed as to -- because these salmon are no  
24 longer there, that viable source of protein that  
25 my people had is no longer there, and it is

1 causing a cumulative effect to this point. And  
2 that's ongoing.

3 MR. CLARY: Prospective.

4 MR. CROW: I understand entirely. But  
5 I think the more pertinent issue is the  
6 relationship between the issues raised and  
7 ongoing effects. And there are direct effects,  
8 and there are indirect effects. And then there  
9 are effects some consider to be further indirect  
10 effects.

11 And I think that's what you see in our  
12 response to your request to do this kind of  
13 study, is that those effects are too indirect to  
14 be taken into consideration in the scope of this  
15 relicensing.

16 CHAIRMAN GIBSON: Too indirect? What  
17 do you mean? Explain yourself.

18 MR. CROW: Well, I mean, indirect  
19 effects would be the blockage that the dams  
20 create, that the fish can no longer swim  
21 upstream. The indirect effects would continue to  
22 be -- well, there may be habitat upstream, and  
23 there need to be mechanisms to create  
24 additional -- you don't have to have additional  
25 fish passage to do that.

1                   Whether or not the fish provide  
2           additional ecological further upstream, in this  
3           particular case, as you just mentioned, which I  
4           think is the issue before you, further upstream  
5           the fish provided protein source and the  
6           diversity to the diet. In this case, that was  
7           too far unrelated to what the Commission  
8           traditionally encompasses, as far as doing the  
9           environmental analysis, to be included in that  
10          analysis.

11                   CHAIRMAN GIBSON: That's pretty hard  
12          for me to understand or comprehend, you might  
13          say. If, in fact, you're looking at the impacts  
14          and future impacts, that's definitely a future  
15          impact that my tribe is still suffering. I can't  
16          understand, then, what you would actually be  
17          doing, then, as to -- what exactly are you doing,  
18          then, for any of it, then? What do you consider  
19          an impact, then?

20                   MR. CROW: Well, as indicated in the  
21          environmental assessment, one of the impacts is  
22          the blockage that -- the fish blockage that the  
23          facility creates. And staff looked at how much  
24          habitat is available upstream. What can it do as  
25          far as fish population is concerned? And the

1 recommendation is to install fish passage  
2 facilities.

3 CHAIRMAN GIBSON: Now, is that going to  
4 be an official recommendation of the --

5 MR. CROW: Yes, it is. That's a  
6 recommendation that the Commission can,  
7 ultimately, say yea or nay to, but that's a  
8 recommendation the staff has in the environmental  
9 assessment.

10 CHAIRMAN GIBSON: Um-hmm.

11 MR. CROW: They don't have any specific  
12 recommendations related to doing any additional  
13 studies of the nature you're requesting, which is  
14 looking at the effects on whether or not the  
15 project has had an impact on the health of the  
16 tribe. I've never known that to be --

17 CHAIRMAN GIBSON: But they're directly  
18 related.

19 MR. CROW: I understand that's the  
20 tribes' position.

21 CHAIRMAN GIBSON: It couldn't be any  
22 more direct.

23 MR. CROW: Well, that is certainly  
24 clear. The tribes have made it clear in at least  
25 three different proceedings before the

1 Commission. Ultimately, the Commission will have  
2 to make a decision when it takes final action on  
3 the license, Should this be something that is  
4 taken into consideration? And as I mentioned  
5 earlier, they have three ways to go. They can  
6 agree with staff that there is an insufficient  
7 nexus to take that analysis, they can put a  
8 condition in that license that will address it,  
9 or they can direct the staff to reevaluate that.

10 CHAIRMAN GIBSON: I guess I'm still  
11 having a hard time trying to understand what you  
12 guys would consider an impact from this point on.

13 MR. HOWARD: Mr. Chairman, could I say  
14 just a couple words? You know, it's the loss of  
15 health of the tribe, but it's also contributed to  
16 the loss of spirituality and culture because the  
17 ceremonies that used to go with it are no longer  
18 being done. So it broadens. It's not just  
19 attached to the health.

20 MR. CROW: I understand that, and I  
21 appreciate that clarification. I think that is  
22 mentioned in at least three different pleadings  
23 that the tribe has made with us.

24 CHAIRMAN GIBSON: So I'm still waiting  
25 for my answer on the question as to what -- at

1       this point, what does the Commission consider an  
2       impact?

3               MR. CROW:  The effects on -- the  
4       ongoing effects of the project on the fishery,  
5       which is one of the principal issues it can have.  
6       And it looked at the --

7               CHAIRMAN GIBSON:  On the fishery.

8               MR. CROW:  On the fishery.  And it  
9       looked at various alternatives, including whether  
10      or not to put fish, which, in theory, would also  
11      enhance the resources of the tribes of concern.

12              CHAIRMAN GIBSON:  Well, you know, if,  
13      in fact, my tribe had the fishery that we enjoyed  
14      before the power company along, my tribe would be  
15      very wealthy because of the fishery that we would  
16      have there.  See, right at this point in time,  
17      we've only been able to establish residence  
18      fishery because of the blockage that Hells Canyon  
19      produced.

20              And so if we enjoyed the fishery that  
21      would have been there, the country that we live  
22      in, people would be flocking to that place to  
23      fish, and which they were.  When you go back and  
24      look at the executive order within the treaty,  
25      the River Valley Treaty that established the

1 reservation, the salmon were so plentiful that  
2 they were inexhaustible, is what it states in  
3 there.

4 And if we had that opportunity to have  
5 a fishery that -- at that time, see, our people  
6 were catching the salmon. They were selling them  
7 to the ranchers. They were selling them to the  
8 miners. And it was a real resource that we had,  
9 a resource that we had that we were able to  
10 utilize for the economic well-being of my people.  
11 And not only the health portion of it was  
12 eliminated, but that portion of the economic  
13 resource was also eliminated.

14 MR. CROW: And I fully appreciate your  
15 concerns. The salmon are not present downstream  
16 in the Malad Project now, but what fishery is  
17 there is going to be enhanced through the  
18 licensing process. In theory, if it's enhanced  
19 through the licensing process, at least native  
20 fishing, would it not provide a benefit above and  
21 beyond what's there now? Is that not a correct  
22 statement?

23 CHAIRMAN GIBSON: State that again.

24 MR. CROW: That the enhancements that  
25 are being recommended in the environmental

1 assessment now provide for enhancement to the  
2 fishery. The fishery that exists there now, as  
3 we all know, the salmon haven't been there since  
4 the construction of the lower dam. But the  
5 fishery enhancements that are provided there  
6 would provide additional resources above and  
7 beyond what's there now, to the tribes, would it  
8 not?

9 CHAIRMAN GIBSON: Well, not necessarily  
10 to the tribes, because the State has the control  
11 of the fishery.

12 MR. CROW: But there's additional  
13 potential resources that the tribes can utilize  
14 if enhancements are brought forth --

15 CHAIRMAN GIBSON: Yeah.

16 MR. CROW: -- as stated in the  
17 environment assessment.

18 CHAIRMAN GIBSON: But that would have  
19 to go along with all of the other projects, too.  
20 You can't just enhance the one project and  
21 expect, you know, something to happen.

22 MR. CROW: I fully understand that.

23 CHAIRMAN GIBSON: It has to --

24 MR. WINCHELL: Of course, the  
25 enhancement on the fishery with the rainbow and

1 the red-band trout, again, that's something  
2 that's indigenous right there to the drainage.  
3 And I do think for -- of course, the analysis  
4 felt that the proposal to do this fish passage  
5 plan, you know, that adaptive management in its  
6 scope, starting with fish passage along the lower  
7 dam, would improve the fisheries there at least  
8 double.

9 And where, arguably, if there would be  
10 a need and, you know, they habitat upstream from  
11 the lower dam, could be -- you could have fish  
12 passage all the way through the upper development  
13 dam, all the way out in the Malad drainage. So  
14 therefore, with the fish management plan the  
15 Commission staff recommended, you could restore  
16 the trout there.

17 MR. CROW: Well, you could enhance the  
18 native fishery.

19 CHAIRMAN GIBSON: And we're in full  
20 support of that. However, that -- I guess that's  
21 one component of it.

22 Getting back to the cultural side of  
23 it, one of the things that has to happen, you  
24 can't -- in our lives, in our upbringing and  
25 tradition and culture, you just can't enhance

1 something, you know, and, you know, it's going to  
2 be fine and dandy. The cultural part of it, the  
3 spiritual part of it has to come along with it.

4 In order for that to come along with  
5 it, there needs to be a real, true, assessment  
6 done of the cultural resources in the area, not  
7 just the stone and bones, but the ceremonial  
8 usage of the area and the ceremonies that took  
9 place.

10 That's one thing that hasn't been  
11 afforded to us, that opportunity to apply our  
12 relicense overview to those areas. And that's  
13 what I'm asking the Commission today to consider,  
14 is when will the tribe be able to apply our  
15 traditional usage to the areas, rather than just  
16 the cultural, which you guys call cultural  
17 resources?

18 MR. WINCHELL: And again, I believe,  
19 Terry, you've been out of the room, but we do  
20 think that we can successfully meet those  
21 requests about applying Bulletin 38 to the area  
22 to assess traditional cultural places or  
23 properties within the project area through the  
24 modification of the management plan, to go ahead  
25 and meet those concerns. And again, we stayed

1 off on issuing the final management plan to allow  
2 for this revision.

3 MR. CLARY: When is that contemplated?

4 MR. WINCHELL: Well, it will be after  
5 license issuance, based on the Commission's  
6 decision.

7 CHAIRMAN GIBSON: Excuse me, how do  
8 you -- or what assurances do we have, as a tribe,  
9 that any of this is going to take place once a  
10 license is issued? Because once a license is  
11 issued, there's no longer a reason for the  
12 private entity to follow any of those, what  
13 they're going to say are recommendations, that  
14 can't be met or, you know, this type of thing?

15 MR. WINCHELL: Okay. Number one, okay,  
16 they will have to file a management plan with us  
17 within a year after license issuance. That's  
18 programmatic agreement. Before they can do that,  
19 though, they must consult with all of the involved  
20 parties. With the management plan, that has to  
21 be -- that's a mandatory part of the license,  
22 condition of the license, is that it will have to  
23 be filed with the Commission within a year after  
24 license is issued. So that's a hard and true  
25 product.

1                   CHAIRMAN GIBSON:  What are the  
2                   repercussions if this isn't filed?

3                   MR. WINCHELL:  Then through the  
4                   programmatic agreement, if there's an issue with  
5                   the management plan that has been issued, then  
6                   that can be brought before the Commission, and we  
7                   can go ahead and hold another meeting, along  
8                   with, well, the licensee as well as the tribe, to  
9                   remedy that issue.

10                  But the whole process will allow for  
11                  good consultation to go ahead and develop the  
12                  final management plan that must be filed to  
13                  the Commission within a year.

14                  MR. CROW:  Let me just point out that  
15                  once a license is reviewed and any subsequent  
16                  hearings are dealt with, the licensee has little  
17                  choice but to comply with all of the  
18                  requirements.  And part of the license, the bad  
19                  things that can happen if they don't, they can be  
20                  fined up to \$10,000 a day and be issued  
21                  compliance orders.  Ultimately, the worst-case  
22                  scenario would be the license would be revoked if  
23                  they failed to comply with the license.  Not too  
24                  many people want to be in that position.

25                  CHAIRMAN GIBSON:  Yeah, the reason I

1 bring this up is because the way the process has  
2 proceeded at this point in time -- how should I  
3 say? -- is fictitious. There's been programmatic  
4 agreements signed that are not true. It's an  
5 outright lie where it says consultation has taken  
6 place with this entity. And that's not true. I  
7 mean, it's just flat out not true.

8 MR. CROW: You know, the definition of  
9 consultation is there is -- the opportunity is  
10 provided to comment on something.

11 CHAIRMAN GIBSON: No, the definition of  
12 consultation is that good-faith consultation will  
13 take place, meaningful consultation.

14 MR. CROW: I do understand what you're  
15 saying.

16 CHAIRMAN GIBSON: Not the perception of  
17 consultation taking place.

18 MR. CROW: Well, there's not -- you  
19 know, we can't force tribes or somebody to  
20 consult. All we can do is ensure they have an  
21 opportunity.

22 CHAIRMAN GIBSON: Well, we've been  
23 begging to consult for a number of years.

24 MR. CROW: And that's --

25 CHAIRMAN GIBSON: You know, it's not us

1 that needs to be forced to consult. We've been  
2 begging to consult and asking to consult. But  
3 when the Commission floats these programmatic  
4 agreements out there that says consultation took  
5 place, and then you got the BLM signs it, the  
6 Fish & Wildlife signs it, the Forest Service, all  
7 of these guys sign it, it's an outright lie,  
8 because the Commission is the one that laid that  
9 programmatic agreement out there and said that  
10 this consultation took place, which it didn't.

11 It didn't take place with my tribe.  
12 None of those entities consulted with my tribe;  
13 yet, your document says it did.

14 MR. CROW: And whether you agree with  
15 it or not, I mean, they consulted, and they  
16 provided the document, and they were given an  
17 opportunity to. Now, I understand where you're  
18 coming from, but I think --

19 MR. CLARY: Certainly, there's no  
20 consent provided, and that's a key point. I  
21 think the --

22 MR. DYKSTRA: A comment period is not  
23 equal to consultation.

24 CHAIRMAN GIBSON: Nor is the -- you  
25 know, it's really clear and specific as to

1       consultation and what constitutes consultation,  
2       you know, not such as you're saying. No  
3       disrespect, but you're sitting here trying to  
4       tell me that, you know, the perception was there,  
5       you know, the document was put out there. Well,  
6       yeah, the document was put out there, but it said  
7       that you consulted with us, and you didn't.  
8       Simple as that. You didn't.

9               MR. CROW: Well, maybe the lesson to be  
10       learned is that if the Commission issues its  
11       license, and if there is -- then it will be, if  
12       it adopts the recommendation the staff has, the  
13       programmatic agreement will call for consultation  
14       to occur after the license is issued to do a lot  
15       of the things that you just mentioned you desire  
16       to have happen.

17              MR. HOWARD: And --

18              CHAIRMAN GIBSON: Let him finish first.

19              MR. CLARY: Yeah, go ahead.

20              MR. CROW: So the issue then becomes,  
21       What is consultation? And the postlicense  
22       agreement, where you have the opportunity to set  
23       forth your specific concerns regarding  
24       conditional properties that impact the area,  
25       fortunately, in the programmatic agreement, there

1 is a provision whereby if there's a dispute  
2 between the tribes, or any other cultural  
3 interests, of what has taken place or in the  
4 adequacy of the plan that's developed, there's a  
5 form of additional involvement from the  
6 Commission.

7 CHAIRMAN GIBSON: From the resources  
8 advisory council. And I understand that.

9 MR. WINCHELL: No, from us.

10 MR. CROW: With the tribes, is my  
11 point. And if there is a disagreement, that can  
12 be spelled out at that time. Ideally, it  
13 wouldn't be a procedural disagreement; it would  
14 be a technical disagreement as to what the  
15 management plan develops.

16 But I think that you'll see us get  
17 involved if that process is not working. It just  
18 so happens that I checked with the person who  
19 does all the postlicense consultation, cultural  
20 resource consultation, and fortunately, it's  
21 worked out well and ideally worked out well here.  
22 But when it didn't -- and she said that,  
23 ultimately, we had to convene a meeting with the  
24 cultural resources interests to reach something.

25 So I think that, ultimately, your great

1 concern is what constitutes -- will, necessarily,  
2 have to come to place to where this programmatic  
3 agreement is put into effect.

4 MR. CLARY: Is there any way that that  
5 can be addressed up front, so that there are not  
6 these types of issues?

7 CHAIRMAN GIBSON: Yeah, and let me  
8 expound on that a little bit. That's all we're  
9 asking. You know, we're sitting here hashing out  
10 "what is consultation" when all we're asking is  
11 to be consulted with.

12 MR. CROW: Consulted in an open forum  
13 that allows for the exchange of information  
14 between the various parties, is what I'm  
15 gathering, as opposed to consultation where you  
16 get a letter from the power company that says,  
17 What do you think of this plan?

18 CHAIRMAN GIBSON: Exactly.

19 MR. CLARY: Show up on a certain date,  
20 whether you can make it or not. We got any  
21 number of those.

22 CHAIRMAN GIBSON: Yeah. We're asking  
23 that we consult, we have meaningful consultation,  
24 dialogue, to where things are being addressed and  
25 we're developing information -- producing

1 information and developing procedures that's  
2 going to assist the company in meeting the law  
3 and meeting the time frames as to what we're  
4 trying to deal with here, such as Bulletin 38.

5 Now, as I understand, earlier you  
6 mentioned we will be consulted with pertaining to  
7 Bulletin 38 and the application of Bulletin 38 to  
8 these areas?

9 MR. WINCHELL: Yeah, yeah.

10 CHAIRMAN GIBSON: Ted?

11 MR. HOWARD: Can I say something here?  
12 And I think there's one thing we're missing here,  
13 which is acknowledgment of tribal sovereignty.  
14 You're looking for a "one size fits all" policy  
15 to consult the tribes. And your Indian policy is  
16 good knowledge of government-to-government  
17 consultation with sovereign Indian tribes. My  
18 point being, sovereign tribes may not look at  
19 consultation the same. So you cannot have this  
20 "one size fits all."

21 If the way my chairman wants to consult  
22 is different from the others, then so be it.  
23 That's his right as a sovereign entity and a  
24 chairman of our nation. So you can't dictate to  
25 him or anybody else what consultation is. It has

1 to be a mutual agreement. This is the way we  
2 want to be consulted, so there it is.

3 MR. CROW: I appreciate that. All I  
4 was doing is trying to clarify what has  
5 constituted consultation in the past.

6 MR. HOWARD: In your opinion. Here's  
7 the sovereign leader that's telling you what he  
8 wants.

9 MR. CROW: So I'm just trying to, out  
10 loud, think about how we could possibly word it  
11 or modify the EA to include additional language  
12 that would provide for meetings to actually take  
13 place as to, traditionally, what is considered to  
14 be consultation.

15 CHAIRMAN GIBSON: Yeah. To us,  
16 consultation isn't a letter being sent out  
17 saying, Okay, here's a document we've produced,  
18 and you're invited to concur with it. We want to  
19 sit down and produce it with you. That's what we  
20 want. That's consultation. That's where you  
21 have meaningful consultation where you interact  
22 with the company, you know, regardless of what  
23 goes on.

24 I mean, I have -- we've got to live in  
25 this valley, you know. These folks here in the

1 future are going to need transmission lines and  
2 you name it all throughout this region, and  
3 they're going to have to deal with this tribe to  
4 get those.

5           Either we sit down now and we develop  
6 consultation in a meaningful manner that's  
7 addressing our issues and our concerns and  
8 assisting them and moving forward, otherwise it's  
9 going to be very, very, costly for this company  
10 to move forward in trying to put one simple power  
11 pole in, trying to put one simple line  
12 underground wherever, whatever it takes, wherever  
13 there's going to be a ground disturbance,  
14 wherever there's going to be issues, all of these  
15 things, all of these various acts and federal  
16 laws that are going to be out there, that each  
17 time they want to put a pole in the ground,  
18 they're going to have to go through this whole  
19 process and will probably end up going through  
20 court procedures to try to do it.

21           And that's what I'm here to try to  
22 avoid, as I mentioned up front. I'm here to  
23 build a partnership. I'm not here to butt heads  
24 with you. I'm not here to butt heads with  
25 anybody. As a matter of fact, we were the

1 catalyst that was out there assisting the  
2 Commission in establishing their Indian policy  
3 and establishing procedures and processes within  
4 that, that is going to protect all everybody  
5 involved.

6 And now we come to a point where we're  
7 saying, Well, you know, what is consultation?  
8 How do we describe consultation? You know what  
9 constitutes consultation? And I don't think  
10 that's somewhere we even need to be. I mean, how  
11 difficult is it for the Commission or the federal  
12 entity to follow the law?

13 MR. WINCHELL: I'd like to just say,  
14 with what Chairman Gibson is saying, that, yes,  
15 we can do that. And I think the best place to  
16 put that in there, a consultation protocol, is in  
17 the management plan because that's a document  
18 that's going to get used as --

19 MR. CLARY: Can we see that prelicense?

20 MR. WINCHELL: Well, at this point, we  
21 felt it was most appropriate to go ahead and  
22 delay the issuance of the final management plan,  
23 but that was our original intent, based on the  
24 comments from the Shoshone-Paiutes, that we go  
25 ahead and wait until a year after license

1       issuance to file that plan and allow enough time  
2       to go ahead, have some discussions with the  
3       licensee on exactly that, a protocol for  
4       appropriate consultation based on certain  
5       project-specific actions. And that's the best  
6       place to put that, is in the management plan.

7               MR. CROW: Clearly, you made an  
8       extremely valid point. And I couldn't have done  
9       it better myself, when you talk about the new  
10      process, that your tribe was involved, a lot of  
11      influence, sitting down in a public forum and  
12      exchanging information. It seems as though that  
13      would be something that we could take back to the  
14      Commission to modify the PA, to make sure that,  
15      in fact, happens.

16              But I can tell you, from a practical  
17      standpoint, that's always been our policy, is to  
18      encourage licensees to do it, because it makes  
19      sense. Why spend money putting together a  
20      document, ship it out to somebody, they don't  
21      like it? Then you have to either modify it,  
22      because we tell them to; that generally happens;  
23      they have to spend more money to remodify it. It  
24      makes perfect sense to reach a consensus up front  
25      as to what the scope and the manner in which --

1                   CHAIRMAN GIBSON: That's all we're  
2 asking. Let's do it right the first time.

3                   MR. CROW: Certainly, we might be able  
4 to find any license issued to be able to  
5 accommodate that.

6                   MR. WINCHELL: Yeah. And I would like  
7 to say this about the PA. The PA is just a  
8 standard mechanism to implement a management  
9 plan. So I would recommend not modifying the PA,  
10 because I don't think that's really the end  
11 product. The management plan is the end product.  
12 So we certainly have already said that, but  
13 that's one of the things we're going to want to  
14 see done, is to go ahead and address those issues  
15 that the tribe, specifically, had involving the  
16 draft management plan. And we said that in our  
17 last letter that we sent, along with the final  
18 PA.

19                   Okay. So that's where the consultation  
20 protocol can be worked out very explicitly and to  
21 the tribes' satisfaction within the management  
22 plan.

23                   Now, I think in a license order before  
24 the Commission, there could be some language  
25 there to go ahead and at least reinforce this

1 kind of consultation that Chairman Gibson was  
2 talking about, that we certainly could probably,  
3 upon the Commission's approval, put that language  
4 within the license order, within the cultural  
5 resources article.

6 But again, the heart of the  
7 consultation process would be put into the  
8 management plan. That would be finalizing a year  
9 of --

10 MR. CROW: But when we reach that  
11 point, we'll see what we can do for a mechanism  
12 with the license.

13 MR. WINCHELL: Yeah, yeah.

14 CHAIRMAN GIBSON: Um-hmm. Don?

15 MR. CLARY: Yeah, I mean, obviously,  
16 I'd like to see some language to see it being  
17 incorporated and how it would be done.

18 CHAIRMAN GIBSON: But it would be --  
19 and before anything is finalized, we would like  
20 to see the language "with good-faith  
21 consultation." We would like to see the language  
22 that's been proposed rather than going back and  
23 coming back and saying, Oh, there it is.

24 MR. CROW: There's absolutely nothing  
25 wrong with your request. All I can do is take it

1 back and advise that kind of concern to the  
2 staff. And then either we can try and draft  
3 something that adopts your request, but we might  
4 be able to draft something. And I can't make any  
5 commitments at this point, but that's not without  
6 motion.

7 CHAIRMAN GIBSON: Well, good. We got  
8 something done.

9 MR. CLARY: That's great.

10 CHAIRMAN GIBSON: That's what  
11 consultation produces. Consultation produces  
12 results, and usually positive results. At least  
13 in my tribe's way of doing business, we consult  
14 for a reason, and that's to make things happen in  
15 a positive way. And that's to protect the  
16 interests of my tribe, protect the interests of  
17 our spirituality, our culture, and all of these  
18 things, but also to be able to turn our lights  
19 on, you know. And that's something we're here to  
20 assist in doing.

21 And we shouldn't have to be this way  
22 all the time. It shouldn't have to be like that.  
23 And we should have it just laid out and work it  
24 out and make sure that all issues are being  
25 addressed through mitigation before any action

1 takes place and then we're back to square one  
2 again.

3 MR. CROW: I very much appreciate that.

4 MR. CLARY: I was going to ask him to  
5 also -- you had some documents. You want to work  
6 those out?

7 MR. DYKSTRA: Okay. Well, as you've  
8 been hearing about the importance of the tribe,  
9 about traditional cultural properties, and making  
10 sure that those sites are protected as well as  
11 sustained over the long term, but also, cultural  
12 resources has also been mentioned as being  
13 extremely important to the tribes. And I just  
14 want you to know here that to us, the fish and  
15 wildlife are part of cultural resources.

16 And so most of my comments are going to  
17 be more in reference to the fish and wildlife end  
18 of things, but those -- it is a part of cultural  
19 resources. I just want to be clear with that.  
20 So I actually have a laundry list of bulleted  
21 items from the EA that I would just like to state  
22 now.

23 So the first point is the importance of  
24 establishing ramping rates. I know that's  
25 something that you've addressed in the EA. And

1 we still believe that setting ramping rates  
2 somewhere between two inches per hour is  
3 important. Not only will that ensure that  
4 cultural sites can be protected, but also  
5 protects fish spawning gravels as well as  
6 sensitive life stages of trout.

7 So setting ramping rates is important.  
8 The second thing I want to say is that we  
9 would -- the tribes would like to work with FERC  
10 and/or the power company to identify and then  
11 acquire land, land parcels. So land acquisition  
12 is important to us. We believe that that's an  
13 appropriate way to mitigate the impacts that the  
14 Malad Project has had.

15 So that's the second point. The third  
16 point is that a number of places in the EA, you  
17 talk about coordinating with Fish & Wildlife  
18 Service, coordinating with Idaho Fish & Game.  
19 And we certainly applaud those coordination  
20 efforts, but simply want to be part of that as  
21 well. And I believe some of this conversation we  
22 had earlier ties directly into that.

23 So we would like to be worked into  
24 consultation on the broad sense, including  
25 specific issues, such as the fish passage

1 constructions you've talked about. The tribes  
2 would like to be involved in that discussion.

3 The fourth point, and a point that was  
4 raised in the EA, is the importance -- just this  
5 is in general -- for Idaho Power to establish a  
6 decommissioning fund. I know that was something  
7 that was also brought up in the EA.

8 And I believe FERC's response to that  
9 was that might not, necessarily, be necessary at  
10 this time. We, however, believe that it is, as a  
11 way to remedy future problems, should they arise.  
12 This provides a way to fund native fish and  
13 wildlife habitat restoration, and it provides a  
14 funds for that.

15 The fifth point, we've already talked  
16 about the fish passage description that FERC has  
17 outlined. And certainly, realizing that is only  
18 for residence fish at the Malad, because that's  
19 currently all that's there, we would support the  
20 fish passage implementation that you have  
21 proposed in the EA, with the addition that we  
22 hope to see that done soon.

23 And I certainly do appreciate the  
24 adaptive management component that you've worked  
25 in there. And that's something, as I mentioned a

1 minute ago, that part of that adaptive management  
2 discussion, the tribes would like to be involved  
3 in that, along with other federal/state agencies.

4 The sixth point I wanted to make is  
5 about the Bliss Rapids snail. As you're well  
6 aware, that is a listed endangered species that  
7 is in the area, and we believe that there is the  
8 potential that this project could adversely  
9 impact Bliss Rapids snail and, again, would like  
10 to be part of the discussion that will be ongoing  
11 with the Fish & Wildlife Service. And the tribes  
12 would also like to be part of that discussion to  
13 determine what are appropriate measures to  
14 protect this endangered species.

15 And one of those tools that everybody  
16 may use may, again, be land acquisition, as  
17 that's kind of a common theme that pops up when  
18 we're talking about cultural site protection, as  
19 well as important habitat for endangered species.  
20 So we believe land acquisition may be a tool to  
21 meet that objective.

22 A couple more things. I believe Idaho  
23 Rivers commented that they supported restoring a  
24 natural hydrograph as part of the flow rates set  
25 out of the Malad Project. And in support of

1       wanting to do what is best for the native fish  
2       and wildlife and the conditions that native fish  
3       and wildlife are used to, we would support  
4       establishing natural hydrograph outflows from the  
5       Malad complex. Also, screening the draft tubes  
6       to protect native fish, such as white sturgeon,  
7       is something that we would support.

8               I'm almost done. Another point,  
9       sediment transport is an issue that we don't see  
10      firmly addressed in the EA and needs to be  
11      further mitigated for.

12             And finally, my final point is that the  
13      final conclusion in the EA is that this is not a  
14      major federal action. And the tribes, as we've  
15      been on record in the past, believe that this  
16      does constitute a major federal action. It  
17      significantly affects overall quality of the  
18      environment, not just the human component, but  
19      the overall circle of the environment. Thank  
20      you.

21             MR. CROW: Would you like for me to  
22      respond to any of these? I have a couple  
23      questions. One is land acquisition. You  
24      mentioned land acquisition. I don't recall --  
25      and it's been -- I don't have a perfect

1 photographic memory of --

2 CHAIRMAN GIBSON: You say you've got a  
3 pornographic memory?

4 MR. CROW: I said "photographic  
5 memory." When you mentioned land acquisition,  
6 was that in contact with habitat or something?

7 MR. DYKSTRA: Yeah, in protecting  
8 habitat, whether that be habitat that's important  
9 to endangered species, Bliss Rapids snails,  
10 important riparian habitat, as well as land that  
11 has been identified as traditional cultural  
12 properties. That may be a tool that we could  
13 use. I know Rivers, in the EA, propose that as a  
14 tool as well to pursue land acquisition. And I  
15 believe the FERC's response to their request was  
16 saying that it wasn't substantiated, but we still  
17 believe that it is a valid tool.

18 MR. CROW: Which, again, I have to get  
19 back to nexus of the project. I don't recall  
20 that being an issue that was any specific as to  
21 what the land acquisition would be for. That may  
22 be something that evolves out of the -- I'm not  
23 predicting for sure -- the implementation of the  
24 habitat plan, the snail plan that's going to be  
25 developed.

1                   So there may be things that,  
2 ultimately, come out of it that way. But as far  
3 as just acquiring additional land, I don't think  
4 we need to do that, other than maybe do these  
5 other implementations of these other plans.

6                   MR. DYKSTRA: Well, I do think there is  
7 a nexus to this project, because this project has  
8 inundated land; it's had environmental impacts.  
9 One of the ways to mitigate for those impacts  
10 could be pursuing land acquisition.

11                   MR. CROW: And that goes back to the  
12 baseline issue, which I mentioned earlier when we  
13 looked at ongoing effects of the project plan,  
14 but just providing for clarification.

15                   One other thing, the consultative role,  
16 I mean, it does --

17                   MR. HARMS: Excuse me, if we can go  
18 back to the land acquisition. That may be better  
19 found in the Hells Canyon Complex as an  
20 opportunity -- and I'm not sure how well it's  
21 defined in the Malad process -- but I believe one  
22 of the objectives was to acquire land that is,  
23 basically, a trade-off on the impact areas that  
24 you mentioned, inundated land that exists now  
25 that wasn't preconstruction.

1                   Well, my understanding was that  
2                   acquisition would provide land separately for  
3                   those types of issues, in other words, create  
4                   habitat for, whether it's snails, fish, or  
5                   whatever in an area that was not previously  
6                   habitat.

7                   CHAIRMAN GIBSON: I believe that was  
8                   identified in the protocol that's been signed off  
9                   on by all the entities.

10                  MR. DYKSTRA: Yeah, certainly land  
11                  acquisition specifically identified in the EA for  
12                  the Hells Canyon, that land acquisition is going  
13                  to happen in the Hells Canyon.

14                  MR. CROW: That may be the case. Hells  
15                  Canyon is another proceeding.

16                  MR. WINCHELL: Yeah, let's just stick  
17                  with the Malad. But I think if, perhaps, okay,  
18                  again --

19                  MR. CLARY: I think we're just trying  
20                  to draw an analogy here.

21                  CHAIRMAN GIBSON: There's a correlation  
22                  here.

23                  MR. DYKSTRA: My position is other  
24                  processes, such as Hells Canyon, are going to be  
25                  acquiring land for mitigating the impacts on the

1 Hells Canyon Dam, so I believe that the same line  
2 of thought can be applied to the Malad to  
3 mitigate for the impact of the Malad. One of the  
4 ways to mitigate that is acquiring land.

5 MR. WINCHELL: Would that be  
6 appropriately addressed within consultation with  
7 the habitat enhancement program that Idaho Power  
8 has proposed to do in the EA as well as other --  
9 with the snail management plan, the Bliss snail  
10 management plan, too? Would it not be more  
11 appropriate to make those recommendations within  
12 that consultation involved in those particular  
13 plans.

14 MR. CROW: That could be something that  
15 evolves out of the management side of it, but  
16 just to go to acquire additional lands within the  
17 scope of what was looked at, in particular, I  
18 need to reinforce the fact that the additional  
19 land by the construction of the project goes back  
20 to that baseline issue.

21 So there's not much additional analysis  
22 that I can see as warranted in regard to that  
23 particular issue, other than the fact that it may  
24 evolve out of the snail plan.

25 MR. WINCHELL: Yeah, further

1 consultation on those lines.

2 MR. DYKSTRA: And I think there might  
3 be an issue documenting when we're starting.  
4 Obviously, you're starting --

5 MR. CROW: That's something the tribes  
6 had acknowledged in their comment letters.

7 MR. HARMS: Although the tribes have  
8 acknowledged that, I believe what we're talking  
9 about now is, how do we proceed in the future?  
10 So you can continue to bring our attention to  
11 that we're talking about baseline analysis, where  
12 that is, but we're also talking about, how do we  
13 do that with the most expedient way and  
14 successfully regarding the species, snails,  
15 whatever, creating a separate environment as  
16 being addressed in other opportunity areas,  
17 whether that's Hells Canyon or wherever?

18 Certainly, it should and could apply  
19 here. So if these can be developed within these  
20 other habitat discussions, then great. I have a  
21 further concern that on these three alternatives  
22 that you've mentioned, three different things  
23 that can happen on any recommendation, how do we  
24 know, or what kind of answer can you give us to  
25 address our concerns that the things we're

1 talking about that are important to the tribes  
2 are not going to fall into one of those "We can't  
3 do that"?

4 MR. CROW: Well, the issues that the  
5 tribes have raised before the Commission will, in  
6 their final order, either say yea or nay to those  
7 different issues. So ultimately, significant  
8 issues of measure will be addressed by the  
9 Commission in the final order.

10 My only point is, land acquisition for  
11 acquisition purposes, without any record to  
12 support that, is not something that's currently  
13 on the table for recommendation that the staff  
14 has recommended for, other than the fact that it  
15 may evolve out --

16 MR. CLARY: Maybe just fill in a little  
17 bit as to how this meeting will be taken back to  
18 the Commission and how it's going to be filtered  
19 back into the decision making.

20 MR. CROW: Well, we're transcribing  
21 this meeting. It will be made a part of the  
22 record. If you've been watching what has been  
23 happening as far as the Commission's recent  
24 orders, they'll have sections that address  
25 specific tribal issues that, I would vision -- I

1 cannot predict what the Commission will  
2 ultimately do, but they may address each of these  
3 issues on their own merit or may feel that  
4 sufficient record has been established to deal  
5 with the issues.

6 CHAIRMAN GIBSON: Will you be sending  
7 us a copy of that transcript?

8 MR. WINCHELL: Absolutely. And I  
9 want -- before we leave, I've got some  
10 instructions how to get access to it. I think  
11 the easiest thing is to get it off of our  
12 internet site.

13 CHAIRMAN GIBSON: Okay. I think  
14 Mr. Howard had something he wanted to follow up  
15 on, and I think we're going to --

16 MR. HOWARD: All and all, I think our  
17 meeting has been a good one. But today, you  
18 know, as far as cultural resources and the  
19 cultural part, only Section 106 has been  
20 mentioned, you know, and a couple of times the  
21 Bulletin 38 came up, which are both a part of the  
22 National Preservation Act.

23 And under Bulletin 38, Frank, I'm sure  
24 you're aware there's a paragraph that addresses  
25 that section. And I think that's what I'm

1 hearing a lot of, because nobody's considering  
2 our point of view. You know, the federal  
3 entities, federal government, has an obligation  
4 to comply, and federal entities must comply with  
5 all pertinent mandates, not just a selective one  
6 or two.

7 And also, in Idaho Power's process, I  
8 was on a postwork group again pertaining to Hells  
9 Canyon, but my point being is they separate  
10 aquatic, botanical, cultural, et cetera. And  
11 we've never had the opportunity to bring it all  
12 together, because from our culture, our view is  
13 these things are inseparable. And I think that's  
14 one thing that needs to be addressed as well  
15 because cultural resource, as it's defined in  
16 here, is stones and bones, period, case closed.

17 And you know, there was also a comment  
18 Frank made that we provide Idaho Power with  
19 information so they could manage the TCPs. And I  
20 think Mr. Chairman said we want to be a partner  
21 to develop this; we want to be a partner in  
22 managing it because that's what we want. And as  
23 I stated in the beginning of my prayer, that our  
24 culture is dynamic. It's not only those sites  
25 that are in the past that are important; there

1 are sites yet coming. Our culture is a living  
2 culture. In other words, it's not only those  
3 that are in the past that's important.

4 So those are my comments. And I hope  
5 that in the future, that we can look and listen  
6 to the tribes and how they view their environment  
7 and our tradition, rather than talking down to  
8 them. And I think that's addressed in your  
9 Indian policy as well. Thank you.

10 MR. CLARY: I just want to get two  
11 quick things in.

12 CHAIRMAN GIBSON: Yes, sir.

13 MR. CLARY: I just want to say, first  
14 of all, we appreciate what you've stated earlier  
15 about how this results in our comments may find  
16 their way into the ultimate decision. And I  
17 don't want to put this into a negative tone. By  
18 the same token, the tribes' position is  
19 government-to-government consultation should have  
20 taken place prior to the issuance of the EA.

21 And so, therefore, we have to reserve  
22 our right with regard to taking whatever action  
23 we need to in the event that we feel we've been  
24 detrimentally impacted because that did not  
25 occur.

1                   And then, secondly, I just want to  
2                   state that with regard to government-to-  
3                   government consultation, I know you made a  
4                   comment earlier, which I don't think you were  
5                   really indicating that you believe that is not  
6                   something that's not important to take place  
7                   separately or that there isn't an independent  
8                   right, but you indicated that the tribe had,  
9                   throughout this proceeding, taken part. And  
10                  indeed, we did, on a very active basis.

11                  By the same token, we believe the  
12                  government-to-government consultation will give  
13                  its right to a meeting like this one where  
14                  there's give-and-take and what have you. And  
15                  that's something that came out of the hydro  
16                  negotiations that went on about a year ago when  
17                  the policy was issued. And we believe that there  
18                  is something distinct that the tribe has that's  
19                  over and above what the normal stakeholders have.  
20                  And we just want to remind you of that. But  
21                  thank you very much.

22                  MR. CROW: I agree. I mean, I agree  
23                  wholeheartedly, and I very much appreciate the  
24                  time to come out here and talk with you. We  
25                  probably will be interacting you again in as much

1 as the future of Swan Falls hydropower is coming  
2 up. So you'll be seeing some of us in the  
3 future.

4 I can say that I very much appreciate  
5 the opportunity to come out here and that I am  
6 very impressed with the degree to which the  
7 tribes have been engaged in this particular  
8 proceeding, although they may not agree with the  
9 ultimate outcome of a lot of it. It's been a  
10 learning process for a lot of the tribes, but  
11 it's been evidenced by the record that you've  
12 been a full participant. And the hope is you see  
13 the fruits of the exchange on whatever action is  
14 taken and that you'll feel that your involvement  
15 in this proceeding has been well worth the  
16 effort.

17 CHAIRMAN GIBSON: We appreciate you  
18 guys coming out.

19 MR. WINCHELL: And with that, I think  
20 we're done.

21 (Proceeding concluded at 11:30 a.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.