

UNITED STATES

NUCLEAR REGULATORY COMMISSION

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BRIEFING ON NRC TRIBAL POLICY STATEMENT

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PUBLIC MEETING

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MONDAY,

SEPTEMBER 19, 2016

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ROCKVILLE, MARYLAND

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The Commission met in the Commissioners' Hearing Room at the Nuclear Regulatory Commission, One White Flint North, 11555 Rockville Pike, at 9:00 a.m., Stephen G. Burns, Chairman, presiding.

COMMISSION MEMBERS:

STEPHEN G. BURNS, Chairman

KRISTINE L. SVINICKI, Commissioner

JEFF BARAN, Commissioner

ALSO PRESENT:

ANNETTE VIETTI-COOK, Secretary of the Commission

MARGARET DOANE, General Counsel

NRC STAFF:

DAN COLLINS, Director, Division of Material Safety, State, Tribal, and Rulemaking Programs, NMSS

DIANA DIAZ-TORO, Project Manager, Environmental Review Branch, Division of Fuel Cycle Safety, Safeguards and Environmental Review, NMSS

MARC DAPAS, Director, Office of Nuclear Material Safety and Safeguards

PAUL MICHALAK, Chief, Agreement State Program Branch, Division of Material, Safety, State, Tribal, and Rulemaking Programs, NMSS

JOAN OLMSTEAD, Attorney General Counsel for Reactor and Materials Rulemaking, Office of the General Counsel

GLENN TRACY, Deputy Executive Director for Materials, Waste, Research, State, Tribal, Compliance, Administration, and Human Capital Programs

EXTERNAL PANEL:

RICHARD ARNOLD, Chair, National Transportation Stakeholders Forum, Tribal Caucus

R. BUDD HAEMER, Senior Nuclear Counsel, Indiana Michigan Power

SCOTT HANSEN, Executive Committee, National Tribal Air Association, Catawba Indian Nation

REID NELSON, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation

HEATHER WESTRA, Consultant, Prairie Island Indian Community

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9:01 a.m.

CHAIRMAN BURNS: I'll call the meeting to order.

And good morning, everyone, and welcome our panelists, or our first panel. And we'll have a second panel of the NRC staff, but I want to welcome all those who are in the audience and those who may be listening in to today's meeting.

The purpose of today's meeting is to provide the Commission an opportunity to hear diverse views and the staff's assessment of those views that contributed to the development of the Proposed Final Tribal Policy Statement. I'm pleased today; we have a diverse group of presenters for today's meeting. We have representatives from tribes, two inter-tribal interest groups, an electric utility company, a federal government partner, and the NRC staff. And thank you all for being here today.

First we'll hear from our external participants followed by a question and answers with the Commission. And after that we'll take a brief break and then hear the staff panel. I look forward to the presentations and ensuing discussions

Before we begin would my colleagues have anything to say?

(No audible response.)

CHAIRMAN BURNS: Great. We're going to -- we'll start with I think Mr. Nelson, and I'll ask you to introduce yourself. I'll ask each of you to introduce yourselves when it's your turn to speak,

1 please. Welcome.

2 MR. NELSON: Thank you, Mr. Chairman, members
3 of the Commission. I appreciate the opportunity to be here. My
4 name is Reid Nelson. I'm the Director of the Office of Federal Agency
5 Programs at the Advisory Council on Historic Preservation. I'm going
6 to spend a few minutes today just sharing with you sort of an overview
7 of the National Historic Preservation Act itself, its general
8 requirements. We're going to talk specifically about requirements for
9 tribal consultation. The act and the regulations are very specific in
10 that regard. And then I'd like to share with you both some comments
11 on the policy statement itself, as well as some general comments and
12 advice. So I appreciate the opportunity to be here.

13 Let me first start by telling you a little bit about the
14 Advisory Council. It was established in 1966 by the National Historic
15 Preservation Act. It's an independent federal agency that advises the
16 President and the Congress on historic preservation matters. Chief
17 among those matters is our role in overseeing what's known as the
18 Section 106 process. It's a key part of the National Historic
19 Preservation Act that I will talk about in a little bit more detail.

20 The ACHP is overseen by a board of 23 council
21 members, which is headed by Mr. Wayne Donaldson from California.
22 He sends his appreciation for including us in this event.

23 I'd like to just talk a little bit about the National Historic
24 Preservation Act to set some context for why I think your policy
25 statement is so important. First of all, the NHPA has a myriad of

1 responsibilities for federal agencies in ensuring that either properties
2 they own or actions they take are taken with a clear and full
3 understanding of their implications on historic properties.

4 There are really two parts of the National Historic
5 Preservation Act that are principally important in the discussion today.
6 One I'll spend just a little bit of time on, and that's Section 110 of the
7 National Historic Preservation Act. It sets requirements for federal
8 agencies, like the NRC and others, to be good stewards of historic
9 properties that it may affect. It establishes requirements for
10 preservation programs and for the protection of historic properties.

11 The part that I'm going to spend a little bit more time
12 on today is Section 106 of the National Historic Preservation Act.
13 And I will tell you that as the Director of the Office of Federal Agency
14 Programs I am principally responsible with a staff of 22 to oversee that
15 federal review process. The Section 106 process is what we
16 characterize an important federal planning process. And as such, we
17 always emphasize that it is most effective when it is integrated in
18 planning very early on.

19 The Section 106 process has four steps, and I will not
20 go through them in detail, but I just wanted to sort of share with you a
21 little bit about what the process is like and what its goals are.

22 As I said, Section 106 requires agencies to take into
23 account the effects of their undertakings on historic properties and to
24 provide the ACHP an opportunity to comment. The way that the
25 ACHP comments is by issuing regulations that in part e

1 establish that four-step process.

2 It's important that that four-step process be initiated at
3 the earliest stages of planning, and it's also important that it be
4 completed by the time the agency makes its decision typically as it
5 makes a decision through a ROD, or record or decision, or however
6 else it might through its NEPA process. So it's critical that 106 be
7 completed before the agency has taken a final action.

8 I want to just point out in that flow chart that there's
9 sort of four basic steps in the 106 process, and every year about 120
10 or 130,000 actions a year are subject to that review process. About
11 98 percent of them happen without our direct involvement. And the
12 reason that I'm underscoring that is that the ACHP has issued
13 regulations that put in place measures for agencies to begin the
14 consultation process with state and tribal historic preservation officers.

15 It requires consultation with those partners to seek
16 solutions to avoid, minimize or resolve adverse effects to historic
17 properties, and in most circumstances those consultations are played
18 out and adverse effects are avoided. It's only in that process when
19 an agency goes through those first three steps and determines that
20 there may be adverse effects that the ACHP is notified.

21 So I mention that simply to say that the majority of
22 undertakings in the NHPA are subject to consultation between the
23 agency and states and/or tribes and Native Hawaiian organizations
24 without our formal involvement, and the find successful outcomes.
25 It's only when an adverse effect occurs, may occur that we're involved.

1 I want to talk a little bit about participants in the
2 Section 106 process to sort of lay the groundwork for this. The
3 Section 106 process is led by federal agencies themselves. It
4 establishes clear requirements for the federal agency to ensure that its
5 actions, whether it's actions it's taking directly on its own property or
6 whether it's through a license or a permit or funding that it provides
7 -- to ensure that those actions are subject to this review process. The
8 key players in the Section 106 review are of course the federal agency
9 leading the review, and as I mentioned earlier, state and tribal historic
10 preservation officers are important and they're critical to initiating the
11 Section 106 review process. Agencies begin in consultation with
12 those partners.

13 I'll also mention that in Hawaii Native Hawaiian
14 organizations are also critically important. They play role that is
15 somewhat similar to tribes. There are some key differences, but they
16 also play an important role in Section 106 reviews. And of course the
17 applicant; in your case an applicant that may be seeking a license or
18 approval, has the right to participate in a Section 106 review, as do
19 local governments and other parties with an interest in historic
20 preservation matters.

21 Given today's topic I thought I would spend a little bit
22 of time talking about tribal participation in the Section 106 review
23 process. Tribes have always been very important in Section 106
24 reviews, but it wasn't until 1992 that their role was clarified and
25 expanded through an amendment to the National Historic

1 Preservation Act. And in 1992 tribes were put essentially on the
2 same level as state historic preservation officers. So those tribes that
3 established a preservation program and that met certain requirements
4 from the National Park Service, which establishes preservation
5 program requirements, they could become a tribal historic
6 preservation office and play the same role on their lands as a state
7 plays on state lands.

8 The role of tribes was further expanded. The role of
9 tribes in consulting on federal actions was further expanded in 2000
10 by Executive Order 13175, which sets very specific requirements for
11 federal agencies to consult and coordinate with tribes. And then in
12 2004 our regulations were substantially revised in order to clearly
13 place tribes in the important role they are in now in consulting on and
14 being part of the Section 106 review process.

15 So let me just talk a little bit about what that role is
16 about Section 106 and tribal consultation. First, let me say that
17 consultation with tribes must recognize the government-to-government
18 relationship between the federal agency and the tribes. And that's
19 critically important and we find often in Section 106 reviews that
20 agencies that are not aware of or fully sort of embrace that
21 responsibility sometimes run into challenges. And so, it's important
22 that agencies understand that unique role that tribes play.

23 The act and the regulations also establish very clear
24 requirements to consult tribes and Native Hawaiian organizations at
25 any point where the tribe or the Native Hawaiian organization has

1 identified or believes there may be present a property of religious and
2 cultural significance to them. Their opportunity to consult in those
3 circumstances is a right granted to them by our regulations and by the
4 act itself.

5 The other important thing to note in the regulations is
6 that it acknowledges that tribes have special expertise as do Native
7 Hawaiian organizations in assessing the significance and eligibility of
8 historic properties. So their views and their role in the Section 106
9 process is very critical. And I would just say that I think that's
10 particularly true for the Nuclear Regulatory Commission, because I
11 know that many of the areas where you're looking at licenses there
12 are often tribal resources and they tend to be in locations where there
13 may have been Aboriginal rights and tribes that have traditionally used
14 the areas. And so, we know that's important to you all.

15 I want to just make one distinction that Native
16 Hawaiian organizations play a very important role as well. In Hawaii
17 they have the right to be consulted and to participate in consultation
18 when a property of cultural and religious significances may be present.
19 They are not sovereign governments, however. So the agency does
20 not have the same government-to-government responsibility in
21 consulting NHOs. Practically speaking, however, their role otherwise
22 is quite similar to tribes when the action is in Hawaii.

23 So I want to move to just briefly a few comments that
24 we have on the Tribal Policy statement. First let me say that we have
25 already provided comments in the past in writing, and we appreciate

1 your efforts to incorporate those. We think your policy is in -- it's
2 timely and we think it's a strong policy, and we very much appreciate
3 the fact that you all are working on establishing this.

4 Our comments in the past were fairly technical and
5 specific. I'm going to go through sort of one thematic comment in
6 more detail in a moment that's principally about the role of Native
7 Hawaiian organizations, but I wanted to just acknowledge that the
8 ACHP is very appreciative of you establishing this policy.

9 So moving to our more specific recommendations. I
10 think as you may have noted, and as I mentioned, we have advised in
11 the past that the Commission look at Native Hawaiian organizations
12 on a similar level to how it has addressed tribes in this policy
13 statement. We provided advice in the past that they be included in
14 this policy statement. We recognize that the Commission has the
15 right and the opportunity to separate these two in different policy
16 statements, but we want to be clear that while we think this policy
17 makes great strides and establishes strong measures for
18 strengthening your relationships with tribes, we think that leaving
19 Native Hawaiian organizations out of the policy level raises some
20 challenges for you all.

21 Now our advice in the past was for you to consider
22 adding Native Hawaiian organizations to this policy statement, but we
23 recognize that your agency wants to make the distinction in the
24 different role that those two organizations play. So we would simply
25 advise that if it's the Commission's decision not to include Native

1 Hawaiian organizations here, that it consider developing a similar and
2 separate policy on Native Hawaiian organizations. And I say that
3 because they -- as I mentioned, while they do not enjoy the
4 government-to-government relationship with your agency and others
5 that tribes do, their role, their right to participate in consultation and
6 their expertise in identifying the significance of properties of
7 importance to them is critical and similarly unique.

8 So, I guess in sum we would urge you -- if you choose
9 not to address Native Hawaiians in this policy statement -- we would
10 urge you with all haste to consider a similar policy statement to
11 address them there.

12 So, let me just move to some fairly general
13 recommendations, and I'm going to go through them fairly quickly
14 because I think we're very supportive of what you've done here.

15 One is I think, as I said earlier, it's very important to
16 engage tribes early in the process. I have often said that the only thing
17 more difficult than engaging tribes early is engaging them late. And
18 there are some that think that it's added work to bring tribes in early.
19 I flip that over and say that if tribes are not brought in early, it's going
20 to take more work to sort of undo the conversations that have
21 happened without them present.

22 And I would say that the same thing falls -- is true with
23 Native Hawaiian organizations. As I mentioned earlier, it's critically
24 important to recognize the expertise that tribes and Native Hawaiian
25 organizations have. And that's not just a recommendation. It's a

1 requirement of our regulations.

2 Moving on with the general recommendations, I would
3 also say that it's important that the agency work carefully at the early
4 stages of planning to identify which tribes and Native Hawaiian
5 organization it should include in consultation. And I would urge
6 agencies to be expansive in their inclusion. Again, we find that
7 agencies that exclude often have less robust and effective Section
8 106 outcomes.

9 And I would say that one of the best ways to include
10 tribes and to be able to identify those tribes is to work on building the
11 relationships in the first place, relationships independent from
12 individual undertakings. And we all know that this policy statement is
13 going to position your agency to do that even more effectively.

14 Finally, I'll just acknowledge that there are some
15 common ways we recommend agencies consider achieving those
16 goals. One is, as always, we encourage agencies to train key staff in
17 the requirements of Section 106. The more they know, the better
18 they're able to convey those requirements to applicants, the better
19 they're able to successfully carry out those reviews.

20 And I mentioned applicants a number of times. We
21 also think it's critically important that your agency work to educate and
22 inform your applicants about the Section 106 review process. There
23 are many things we can do to help you with that, but we think it's
24 important that applicants understand those requirements because we
25 know that your agency and many others that license and assist

1 applicants expect the applicant to carry out key steps in the review
2 process. So the more they know, they better.

3 And we would also advise that there are opportunities
4 to involve them early on in discussions about appropriate identification
5 efforts. We know a common issue facing your agency is that at times
6 there may be -- archaeological inventories have already been
7 conducted, but there may not have been inventories or up-to-date
8 information about resources of concern to tribes or Native Hawaiian
9 organizations. And so, we recognize that applicants are often
10 facilitating those surveys and we think it's critically important that they
11 be involved and that they understand these requirements.

12 So with that, I will just acknowledge that we will follow
13 up with a specific letter conveying our advice on a number of
14 remaining issues, specifically the advice of recognizing Native
15 Hawaiian organizations.

16 I would just close by saying that we have a few key
17 points of contact there. In addition to myself, I have a colleague,
18 Valerie Hauser, who is the Director of our Office of Native American
19 Affairs, always open to assist and engage with you on this. And then
20 of course Sarah Stokely, our liaison with your agency is with us. And
21 she's also on the ground and ready to help you wherever possible.

22 Let me close by saying that we very much appreciate
23 this opportunity to comment. We appreciate your partnership and we
24 wish you the best in implementing this policy.

25 CHAIRMAN BURNS: Okay. Thank you, Mr.

1 Nelson.

2 Ms. Westra?

3 MS. WESTRA: Thank you. Good morning,
4 Chairman Burns, Commissioner Svinicki and Commissioner Baran.
5 My name is Heather Westra and I serve as a technical consultant for
6 the Prairie Island Indian Community located in Minnesota. I've been
7 working for the Prairie Island Tribal Council for close to 22 years and I
8 sincerely appreciate the invitation to be here today to discuss the
9 finalization of the NRC's Tribal Policy Statement.

10 From the very first day working for the Prairie Island
11 Indian Community I've been waiting for the NRC to develop and
12 implement some kind of tribal policy, so on behalf of the Prairie Island
13 Indian Community I'm very glad to see its publication.

14 Before I begin I'd like to recognize and thank staff
15 from the NRC Region III and Headquarters; and I see many of them
16 here today, for their professionalism and dedication to the Prairie
17 Island Indian Community. Working with such great staff makes my
18 job a lot easier. We believe that our strong relationship with the NRC,
19 both at the regional and headquarters levels, is based on mutual
20 respect and a shared goal of protecting the environment and public
21 health.

22 So for my first slide, just kind of as a review, Prairie
23 Island's reservation is located on the ancestral homeland of the
24 Mdewakanton Dakota on Prairie Island, which is formed at the
25 confluence of the Vermillion and Mississippi Rivers. It's located in

1 Southeastern Minnesota about 35 miles southeast of the Twin Cities.
2 The Mdewakanton, or Those Who Are Born of the Waters, have lived
3 on Prairie Island for countless generations.

4 So in the next slide; and that's my last slide, you can
5 see that the Prairie Island Nuclear Generating Plant is immediately
6 adjacent to the reservation. There is no community closer to a
7 nuclear power plant, or spent fuel storage facility for that matter, than
8 the Prairie Island Indian Community. The plant has been online since
9 1973 and they're currently licensed to operate until 2034.

10 As you can see, this is ISFSI, or spent fuel storage
11 installation, which was just relicensed for an additional 40 years, is just
12 600 yards tribal members' homes and less than a mile from Prairie
13 Island's Community Center, Elder Center, Education Center and
14 Gaming Enterprise. It goes without saying that the plant and the
15 ISFSI are the two most important issues for the Prairie Island Indian
16 Community and the tribal council.

17 The tribe was a cooperating agency for the
18 development of the Environmental Impact Statement for the
19 relicensing of the plant's Unit 1 and 2 and for the development for an
20 environmental assessment for the ISFSI 40-year license renewal.
21 We were also intervenors in the Atomic Safety and Licensing Board
22 adjudication for those license renewals. The tribe has participated in
23 numerous NRC rulemakings. Tribal staff and council members have
24 gone on plant inspections, attend a lot of meetings and participate in
25 other proceedings.

1 With regard to the principles in the policy statement,
2 the most important one to us is that the NRC recognizes the federal
3 trust relationship and will uphold its trust relationship with federally-
4 recognized Indian tribes. The basis for the federal/tribal relationship
5 is the trust relationship, a general trust responsibility to federally-
6 recognized tribes. This means that the United States government
7 has a legally enforceable fiduciary obligation to protect tribal
8 sovereignty, self-determination, tribal lands, tribal assets and
9 resources and treaty and other federally-protected and reserved
10 rights.

11 It has been argued that as long as a federal agency
12 complies with its statutory duties, it fulfills its trust responsibilities. We
13 believe that trust responsibility means more than complying with
14 regulations. Of course the NRC regulations ensure that tribal
15 members receive the same protections that are available to other
16 persons. Where we think the NRC needs to do more is in the area of
17 archaeological and cultural resource protection.

18 In the two licensing proceedings with which we have
19 been involved we had to intervene in the ASLB proceedings to ensure
20 that archaeological resources located within the plant boundary,
21 formerly the tribe's ancestral lands, were not negatively impacted, but
22 participating in ASLB proceedings requires resources, and for many
23 tribes resources, both technical and financial, are extremely limited.
24 Fortunately for Prairie Island they have the resources that enabled the
25 tribe to participate in these proceedings.

1 In our comments on the Draft Policy Statement we
2 mentioned a lack of resources as a potential barrier to working with
3 tribes. Many tribes have resource constraints that may prevent them
4 from fully working with the NRC, from the NEPA process all the way to
5 the pre-notification of spent fuel shipments. So we feel this is
6 something that is a barrier and should be taken into consideration as
7 your agency seeks to work with tribal governments.

8 As the NRC moves forward to approve and implement
9 the Tribal Policy Statement we hope there is a concerted effort to
10 make sure that it's implemented evenly from region to region. In
11 Region III we have a great working relationship with the NRC staff,
12 and I hope that's the case with other regions as well. We would like
13 to see the NRC revise its guidance document to better reflect the
14 Tribal Policy Statement and ensure that potential environmental or
15 economic impacts on Indian lands are considered in relevant
16 analyses.

17 On a final note, we're glad to see that the NRC
18 recognizes the importance of a government-to-government
19 relationship in consultation with federally-recognized Indian tribes.
20 It's important to remember that there is no one-size-fits-all approach
21 when it comes to working with Indian tribes. Flexibility will be key to
22 working with Indian tribes. Some tribes may wish to formalize their
23 working relationship with the NRC such as through an MOU or
24 another arrangement, but other tribes may not. But the most
25 important point is to initiate the government-to-government

1 consultation process early, as we had mentioned, and at the highest
2 level possible and then let the individual tribe determine how best to
3 proceed.

4 Thank you for this opportunity to be here this morning.
5 I look forward to answering any questions and participating in the
6 following discussion.

7 CHAIRMAN BURNS: Thanks, Ms. Westra.

8 Mr. Arnold, welcome.

9 MR. ARNOLD: Thank you and good morning. First
10 I have to tell you I feel like I'm in a rodeo here with that clock and I'm
11 going to have to do it in eight seconds or less.

12 (Laughter.)

13 MR. ARNOLD: So we'll see how this goes.

14 CHAIRMAN BURNS: We're a little flexible.

15 MR. ARNOLD: Yes.

16 CHAIRMAN BURNS: It's going to work.

17 MR. ARNOLD: This is nice. I feel like we're at the
18 dinner table here.

19 Thank you for the opportunity to come before you and
20 share some unique perspectives from the tribes that we deal with
21 relative to the Tribal Policy Statement.

22 My name is Richard Arnold. I'm Southern Paiute
23 from the Pahrump Paiute Tribe in Nevada and I am the Co-Chair of
24 the Tribal Caucus who works closely with the National Transportation
25 Forum.

1 I come before you today to share the collection
2 wisdom of Tribal Caucus comprised of various tribes from throughout
3 the United States that work in conjunction with the National
4 Transportation Stakeholders Forum. The Tribal Caucus is a partner
5 and an integral component of the Department of Energy's National
6 Transportation Forum, or the NTSF. The NTSF emerged in 2010
7 from its predecessor DOE's Tribal External Coordination Working
8 Group that was working closely on shipments and transportation
9 storage activities related to spent nuclear fuel and high-level
10 radioactive waste to Yucca Mountain, Nevada.

11 NTSF engages tribes, states and local governments,
12 federal agencies and industry representatives in progressive
13 discussions related to various aspects associated with DOE
14 radioactive shipments regardless of its classification. NTSF is a
15 conduit for tribes and other stakeholders to share perspectives in
16 tandem with receiving and/or transmitting current information and
17 participate in training activities and guide policy decisions. I'm
18 pleased to report to you that we have become -- that NRC has
19 become a welcome participant for sharing vital information with the
20 overall group, and moreover with tribal constituents.

21 Now, I'm just an old country boy, and while we know
22 that policies are essentially to typically implementing and responses to
23 perceive and/or actual need and to identify processes, from what I've
24 seen policies including the proposed Tribal Policy Statement are
25 fundamentally driven by budgets, politics, timing and personalities.

1 With these thoughts in mind, I focus on three key elements: the NTSF
2 overview, the NRC "Tribal Protocol Manual," and the Tribal Policy
3 Statement.

4 I have to give kudos to Stuart Easson, who's probably
5 trying to keep up with me on the slides and trying to coordinate this.

6 So now you can move to slide 2.

7 So as you'll see, with the NTSF Department of Energy
8 -- it's a mechanism for sharing information nationally about shipments
9 of radioactive waste and materials. And I am pleased to say that with
10 the NRC representatives that participate in the NTSF -- Tony Shaw,
11 Stuart Easson, David Strack, Paul Michalak and Gerry Jackson have
12 been instrumental in forming a real relationship, I believe, with the
13 NTSF, Tribal Caucus and other constituents by reaching out to the
14 tribes for a number of years.

15 Slide 3 is really talking about the Tribal Caucus itself.
16 And as you'll note, there is 15 tribes that currently participate including
17 one representative from a group in Nevada covering four different
18 states with federally-recognized tribes of 16. So collectively, 31 tribes
19 are inherently representative at the Tribal Caucus.

20 We believe that the focus that we've seen is really on
21 public health, safety, packaging, transportation, emergency
22 management, security, inspection enforcement, impacts to tribal
23 lands, and effects upon cultural resources, of which you've been
24 hearing.

25 The NRC participation in NTSF is essential. We

1 believe it's a cost-effective -- in their attendance in light of budgets and
2 resources. The Tribal Caucus welcomes, needs and expects the
3 NRC to continue their involvement.

4 Next slide on the "Tribal Protocol Manual." The
5 "Tribal Protocol Manual," as you know, was introduced and brought
6 before actually to the Tribal Caucus in 2012, and we were getting into
7 some very, very preliminary discussions about its impending
8 finalization, or development, I should say. Operational framework for
9 the NRC and tribes is useful because I think it not only helps the tribes
10 understand what the views of NRC -- what they are, but also moreover
11 that the NRC knows -- and we have basically a brokered discussion
12 for -- between both the federal agency and the tribes.

13 The Tribal Caucus is pleased and committed that
14 NRC is committing to institutionalizing a process for formally engaging
15 tribal government, and we think this is essential. The manual that
16 was developed now serves to facilitate the tribal interactions and
17 unique model for addressing those activities under NRC authority, but
18 it's actually being viewed by other federal agencies as well as a good
19 working model. So one, a job well done.

20 The next slide on the policy statement is -- the policy
21 statement was presented to us in 2014. And again, that was very,
22 very important. Admittedly, the policy statement is challenging given
23 the focus, and given the focus is on understood tangible aspects.
24 However, the tribal world view differs significantly, though. I mean, as
25 you've heard by the previous presenters that we're inseparable from

1 our traditional lands. We've personified the land.

2 And so, we view the land and its resources and
3 oftentimes things that are out there that you don't see that may not be
4 those tangible items are understood by tribal people and our ties and
5 understanding to those resources are essential to our wellbeing.
6 We're unable to go any other location or find a place that's going to be
7 suitable because our homelands are where they are.

8 The Tribal Policy Statement serves as the framework
9 for strengthening ties and involvement with tribes, and on June 15th
10 the Tribal Caucus submitted comments on a seventh principle
11 proposing that we -- recommending that tribal people be engaged in
12 working groups. And I'm pleased to say, I guess in part -- and again,
13 English is my second language. So you guys talk one way. You talk
14 east and we talk west out there.

15 So I think one of the things that's integral is that we
16 ask that NRC consider imposing an opportunity so tribal people could
17 serve on working groups. And then basically the response is that
18 you're going to look into that. So we appreciate why you're looking
19 into and hopefully you'll find your way where you're going, because I
20 always have to tell people that traditionally as a Southern Paiute
21 person we believe in 10 directions.

22 And I think that's why sometimes people get lost,
23 because you folks only have four directions, and your four directions
24 are the four cardinal directions: north, east, south and west, but you
25 forget about the other six, which is the past, present and future, up

1 and down; those are all equal directions, and then yourself within that
2 direction. So how you relate to everything around you. And so, you
3 always need to look at things very holistically, and I think it's integral
4 that we continue down that path.

5 We believe that NRC's willingness to share the
6 information in advance is critical. We believe that while eliciting or
7 receiving comments through the collective wisdom of individuals was
8 essential, it allowed the statement to really emerge as a dynamic
9 document serving as the foundation for what we believe is not only
10 vital, but time to move forward the document considering that it's been
11 awhile.

12 I mean, in looking at the comment period, you guys
13 were pretty gracious. Looking at many other NEPA documents and
14 other things asking for comments -- and when I saw 120 days and
15 then thought, well, heck, let's give it another 60 days and -- well, that's
16 downright neighborly. So now we have 180 days to submit our
17 comments. And I believe that that was important and I think it's now
18 time for us to move forward.

19 But by looking -- and if we continue to wait, it's almost
20 like trying to buy that new computer, that one that -- you want to get
21 the fastest computer. So I'm not going to buy one now because it's
22 going to come out bigger and better. And I think that we need to
23 move that forward. Like all policies, nothing is perfect. And
24 sometimes you need to take a bold move and approve the statement
25 for implementation, because after all I think if modifications are

1 needed, there are mechanisms in place.

2 And then most importantly delays in approving the
3 final document result in a missed opportunity to truly demonstrate the
4 progressive and good faith effort reaffirming what you say in the policy
5 as your commitment to work closely with tribes and institutionalize and
6 basically memorialize the comments of the six principles.

7 So with that, I thank you. And doggone it, I went
8 over three seconds.

9 CHAIRMAN BURNS: You did great.

10 MR. ARNOLD: Thank you.

11 CHAIRMAN BURNS: You did great. Thanks very
12 much.

13 MR. ARNOLD: I feel like an auctioneer.

14 (Laughter.)

15 CHAIRMAN BURNS: Mr. Hansen?

16 MR. HANSEN: Thank you very much. Appreciate
17 the opportunity to be here. I got to back up a little bit. I feel like an
18 auctioneer. And if Stuart's ready to go -- there we go.

19 Well, again, my name is Scott Hansen. I am here
20 today representing the National Tribal Air Association. I'm a Region
21 IV appointee from the -- what we call the RTOC, or it's a Regional
22 Tribal Operations Committee.

23 And so, additionally, I work for the Catawba Indian
24 Nation in Rock Hill, South Carolina. On page 18 of the document
25 here we talk about facilities around the country. And going through

1 that last night and previously reviewing, we may be the only tribe that
2 we're within 50 miles of 3 nuclear facilities and soon to be 4. So I
3 have been at Catawba now a couple years and have reached out and
4 worked well with a lot of the NRC staff. And it's very important for us
5 to continue to work on that relationship. Again, I'm here today
6 representing the National Tribal Air Association.

7 If we could move to the next slide, Stuart.

8 The mission is quite simple from our standpoint, from
9 the National Tribal Air. It's to advance the air quality management,
10 policies and programs consistent with the needs, interests and unique
11 legal status of American Indian tribes and Alaskan natives. And we
12 have representatives from all regions and Alaska. We meet a couple
13 times a year. And I think we'll have a real opportunity to cooperate
14 with NRC in the future, certainly in regards to outreach activities.

15 If I could have the next slide, Stuart, that would be
16 great.

17 Again, our principles are quite straightforward and
18 they've already been reiterated, but we have a real focus on
19 sovereignty, self-determination of tribes. Tribes have the right to
20 know and protect the quality of their air. Tribes are leaders, strong
21 partners and co-regulators. Tribes have the legal authority to
22 regulate the Tribal Authority Rule again under the Clean Air Act.
23 That's a very important process for a lot of tribes and many are
24 moving forward in regards to implementing that.

25 As sovereign nations tribes should be consulted on

1 how best to address their communities' exposure to air pollution from
2 off-reservation sources and actively engaged in the process of
3 eliminating harmful off-reservation pollution. And I think it's so
4 interesting that a lot of the federal agencies, again consistent with
5 13.175, are moving forward with consultation processes.

6 And I just as a courtesy to NRC staff and certainly to
7 the Board here always want to recognize the uniqueness that each
8 tribal government really has their own consultation process. And it's
9 so important to respect their desire on how they want to consult. And
10 again, my experience is that (a) they all have a unique process and
11 we need to be very sensitive about that process, because many of
12 those processes include elders. And I think that's really an important
13 point as we move forward with this.

14 So next slide, Stuart, please?

15 Again, a little bit about the National Tribal Air
16 Association. Certainly it was initiated in 2002 working cooperatively
17 with the EPA. Currently there's 112 member tribes. And I've only
18 been on the NTAA Executive Committee a little over a year, but it's
19 interesting to me how tribes -- and I think as we look at the mission
20 and the vision of the NTAA, that we represent not only member tribes,
21 but non-member tribes, because a lot of tribes don't have the capacity
22 right now in terms of air program development, but they start to come
23 on board and get involved with NTAA as time moves on.

24 Again, there's an Executive Committee. Those reps
25 are from each 10 EPA regions and Alaska. We have the bylaws.

1 The National Tribal Air Association is administered out of the Northern
2 Arizona Institute for Tribal Environmental Professionals via a
3 cooperative agreement with EPA.

4 Just shows us a little executive meeting actually that
5 we just had here in Washington, 2016. We meet a couple times a
6 year in regards to face-to-face meetings, and our last one was in
7 Washington. Had an opportunity to meet with a lot of upper-level
8 EPA officials and to do a little work at the White House.

9 Next slide. We talk about the role of NTAA, and it's
10 been echoed today that a lot of tribes are developing the capacity or
11 perhaps don't have the funding to really get involved in a lot of the air
12 quality issues that occur. So NTAA really has taken on a prominent
13 role in developing policy response kits. And so, I certainly have one
14 here that was submitted April 29th, 2015 in regards to the Tribal Policy
15 Statement, but I think the uniqueness out of this; and that's just a list
16 of some of the policy response kits that we've put together, is that
17 NTAA will submit one to each respective federal agency. And then
18 we also put a template together, and that template can be tweaked,
19 modified, edited, submitted by a tribe as they desire. But again, as
20 we start to reflect on variability of tribes' capacities sometimes to
21 develop and respond to issues that are very important to them. This
22 is really an important tool and certainly a benefit for those tribes that
23 are members of the National Tribal Air Association.

24 Next slide. We did respond April 29th. This talks in
25 general about the proposed changes to Principle 1, 2, and 4. We

1 expressed support for Principle 3. And we found little or no NRC
2 outreach to tribes and urged NRC to increase these outreach efforts.
3 And again, this was reflected in the comments to April 29th, 2015.

4 I can certainly say as an environmental specialist with
5 the Catawba Indian Nation that the staff at NRC has reached out to us
6 in particular, so there's variability here across perhaps regions. I
7 think the important message here is that we want to continue to
8 promote the opportunity to outreach with tribes. And I think as
9 Heather had mentioned, that we want to promote consistency among
10 regions.

11 Next slide. We express concern for the lack of
12 implementation of Principle 4 and recommended development of a
13 Tribal Consultation Plan. I think that's being addressed. And we
14 expressed support for Principle 5, but request that it also require NRC
15 to coordinate consultation efforts with other states.

16 Again, I think when you talk about the concern in
17 general that tribes have as programs are delegated; it doesn't matter if
18 it's the Clean Air Act, Clean Water Act or any other program, I think
19 the reality is, is sometimes there becomes a great disconnection
20 between how programs and federal agencies then can consult and
21 discuss, communicate when these programs are delegated. So
22 recognize NRC cannot direct states on how to work with tribes by any
23 means, but again I think that's just a point to add to the record.

24 Talked a little bit about NTAA comments on the linear
25 no-threshold model. I'm not going to get into details about that.

1 We're focused on the Tribal Consultation Policy today we can move to
2 the next slide.

3 I think in conclusion that NTAA is in a great position to
4 help facilitate outreach with tribes. And I think again there's a
5 classical definition differential between outreach and consultation.
6 And again, we want to play a role in helping to promote outreach.
7 Every year we have a National Tribal Air Forum. May be a great
8 opportunity for NRC staff to be at that on an annual basis. We had
9 about 260 participants from tribes across the country last year. So
10 welcome that, and certainly welcome any other opportunities to
11 partner and promote outreach. Thank you.

12 CHAIRMAN BURNS: Thanks very much, Mr.
13 Hansen.

14 Mr. Haemer?

15 MR. HAEMER: Thank you, Mr. Chairman. I am
16 Budd Haemer, Senior Nuclear Counsel at Indiana Michigan Power
17 Company. Prior to my current job I was with the law firm of Pillsbury
18 Winthrop Shaw Pittman, and amongst my clients was Private Fuel
19 Storage. While this experience doesn't make me an expert on the
20 subject of this hearing, I appreciate the opportunity to share my
21 observations. It's my hope that today I will talk less about will be the
22 proper NRC tribal policy and more about the process by which the
23 NRC goes to implement the policy that they choose.

24 Second slide, please. Thank you. For orientation,
25 Indiana Michigan Power Company is the licensee of the Donald C.

1 Cook Nuclear Power Plant. It's one of the 10 operating subsidiaries
2 of American Electric Power. It serves 11 states; the colored areas.
3 The generating capacity for AEP is approximately 31 gigawatts.

4 Paired with each operating company is a transmission
5 company. AEP is leading provider of T&D services with distribution
6 lines of about 223,000 miles in transmission lines of about 40,000
7 miles, including the largest 765-kV transmission system in the United
8 States. Unit 2 of Cook anchors the western end of the 765-kV
9 system.

10 Indiana Michigan Power Company, which is the
11 sapphire blue spots on the map right there near Lake Michigan,
12 serves about 128,000 customers in Michigan and about 465,000
13 customers in Indiana. Nuclear is 41 percent of our generation. Coal
14 is half, and the rest is a mixture of wind, solar and hydro.

15 Next slide. Yes, thank you. It's a two-unit PWR with
16 an ice condenser. And that picture pretty much captures our
17 waterfront. The state park is just to the south, the right side of that
18 picture, and the homeowner's association is to the left side. We're a
19 little bit wider than that picture, but it pretty much captures our
20 waterfront.

21 Next slide. This is the AEP Creed issued in 1934
22 and it remains our touchstone today. The Pokagon Band is a
23 customer. It's a neighbor and it's a member of the local community.
24 Like all our customers, we strive to serve the Band with whatever it
25 needs, whether it be energy efficiency, new or upgraded electrical

1 service, transparent billing, whatever a good electric company can do
2 for its customers.

3 Turning to the next slide, these are the subjects that
4 were discussed when the Band toured Cook in April of 2015. There
5 are also typical subjects of interest to the communities around Cook,
6 although as Heather would probably say, spent fuel probably comes
7 up also.

8 Turning to the tribal policy, with that background, like
9 the other commentators, I think Cook comments highlight the
10 difference between outreach and consultation. As former Chairman
11 Macfarlane recently commented about the phrase "stakeholders,"
12 outreach is an ambiguous term that may obscure rather than clarify
13 what activity it covers. And then doubly confusing is the phrase
14 "outreach to stakeholders." What some may call ambiguity I think
15 reflects the broad methods and approaches that the NRC uses to
16 provide transparency. And as a general matter I think the NRC is a
17 very transparent organization. It's as transparent as possible about
18 its activities, and certainly that is something that we as the licensee
19 encourage the NRC to continue. And to outreach to all of the
20 interested communities, whether they're regulated or recognized tribes
21 or not.

22 In contrast, I think as has been emphasized by earlier
23 speakers, consultation is very specific government regulation limited
24 to recognized Indian tribes, and consultation is to engage the
25 decision-making function of the tribes on an issue of significant impact

1 to the tribe. The expectation is that the tribe's decision will receive
2 deference from the NRC unless the NRC has a very strong reason to
3 disagree. And so, the consultation process should not be undertaken
4 where the NRC has no flexibility, because asking the tribal
5 government for a decision where the NRC lacks discretion wastes
6 everyone's time and produces frustration.

7 And lastly, of course, consultation is expensive or
8 costly to the tribes, particularly some of the smaller ones. Funding by
9 the NRC of such tribal activities would require a separate
10 appropriation and authorization because of the limits of the uses
11 currently on NRC funds.

12 Next slide. The staff's resolution of Cook's
13 suggestions on consultation seem to reflect some misunderstanding
14 our intent, and I appreciate this opportunity to clarify. Cook's
15 suggestion is that licensing activities, or licensing actions not be within
16 the scope of tribal consultations. And by licensing actions I'm
17 referring to those actions where the NRC grants, suspends, revokes,
18 amends or takes other action with respect to any licensed construction
19 permit or application to transfer a license.

20 The proceedings for those actions are governed by
21 the regulations in Part 2 of 10 CFR, 10 Code of Federal Regulations.
22 At the threshold the staff's language in Principle 4 is too broad. It
23 would include providing tribal consultation where the tribe is in an
24 applicant or licensee, and such consultations would apparently, if not
25 actually, undermine the NRC's independence in its licensing

1 decisions. But more generally, the staff comment resolution states
2 that the NRC licensing actions may also generate tribal consultation
3 under other federal statutes. And that trigger is exactly the type of
4 area where the clarifying the scope of the tribal consultation is likely to
5 prove the most helpful.

6 I mean, as way of illustration consultation could be
7 triggered by a mitigation plan submitted by an applicant to deal with
8 historic artifacts that might be found during excavation associated with
9 a permitting action being considered by the NRC for a construction
10 permit or something like that. And while it is both required and proper
11 that the NRC defer to the decision of the tribal government on an
12 issue that arises under say the National Graves Protection and
13 Repatriation Act of 1990, it would not be proper for the NRC to defer
14 on the decision to issue the construction permit that leads to the
15 excavation.

16 And that's the type of clarification that our comments
17 strive to try and spell that consultation should be specific to make sure
18 it's focused on what people want. And that's called for in the NRC
19 "Tribal Manual," the "Protocol Manual," and is that clear delineation of
20 the scope of the consultation. And it's important for efficient and
21 effective contributions and consultations.

22 Where the scope of the consultation is not defined by
23 a statute, Cook suggests that the approval of the Commission is
24 needed. Considering the few instances where it's likely to call for
25 such consultation, such prior approval would not seem cumbersome.

1 The staff states that instead the annual reporting to
2 the Commission and Commission approval of the regulatory action is
3 sufficient. The decision to initiate a tribal consultation is a decision to
4 defer to the tribal government in a matter that is otherwise within the
5 NRC's discretion. And I recognize it's up to the Commission to
6 decide whether or not advance approval is the right approach
7 compared to the staff's recommendation to rely on annual reporting
8 with approval of the results of the consultation when it's complete.

9 In summary, the suggestions are to exclude licensing
10 actions from tribal consultations and for the staff to have prior
11 Commission approval before conducting tribal consultations not
12 defined by statute. The staff comment resolution rejects both of
13 those suggestions, and I reiterate for the reasons I've just gone over
14 that you should have to pick at least one of them because it would be
15 inappropriate for the staff to deviate from the procedures in 10 CFR
16 Part 2 without prior Commission approval.

17 And my last point on my second-to-last slide I guess,
18 it's just a reflection that tribal sovereignty is a two-way street.
19 Language is important. Language reflects attitude. And so whether
20 the tribe is supporting the nuclear project, opposing the nuclear project
21 or still just have it under consultation, I think it's important to reflect on
22 the fact that it is a sovereign government.

23 I pulled two specific examples out of a recent SECY.
24 The phrase "dissident Goshutes" when talking about the PFS license
25 is somewhat ambiguous. The phrase "dissident" is a little charged. I

1 think Oxford defines as being somebody who disagrees with a
2 decision by an authoritarian government. And then "Goshutes" is
3 also somewhat ambiguous. There are two recognized tribes: the
4 Skull Valley Band of the Goshute Indians that's involved in the PFS
5 licensing proceeding, and then another, the Consolidated Tribes of the
6 Goshute Reservation. And of course "Goshute" is a broader Indian
7 term.

8 And then the last statement is just the statement that
9 the "PFS is awaiting action on its lease." Obviously the lease is
10 between two parties, and the status reports to the circuit court reflect
11 that it is PFS and the Band that is awaiting.

12 And I don't mean to pick on particular language. I
13 just want to highlight that that's sort of a -- where language is
14 important to show the respect for the tribal sovereignty.

15 My last slide. Do I have it? Anyway, I understand
16 the Commission may ask questions for the panelists. I don't know if
17 I've done as well at the rodeo as my friend Mr. Arnold has, but on
18 behalf of the AEP I appreciate the opportunity to provide input on this
19 important effort. And if I can comment just on the picture here, this is
20 from the Visitor's Center at the Cook's plant, which is where Chairman
21 Macfarlane and Chairman Upton had their joint press conference after
22 touring Palisades and Cook. It's looking west, and so you can see
23 from that clearly a good sign for the Chicago Cubs.

24 (Laughter.)

25 CHAIRMAN BURNS: We'll see about that. Thank

1 you all for the presentations. And this morning, I'll begin with
2 questioning. I take from the comments we've heard as we would
3 expect that as a general matter, there's general support for us moving
4 forward with a policy statement.

5 And there may be ideas, and I like Mr. Arnold's
6 characterization, perhaps that I don't need to wait for the next iPhone
7 or the next, I'm not sure I want that iPhone without the earbuds.

8 But anyway, that not making in effect the perfect, the
9 enemy of I won't just say good enough but a good product. Is that,
10 that seems to be the consensus. There may be things I think all of
11 you said that we ought to be doing in there.

12 The other thing I think I heard too was that while the
13 policy is a good step forward, and it may be an important step forward,
14 we should also not look at it as something static, you know, declaring
15 victory and then moving on without coming back because it seems to
16 me what's important is really not just the words in it but the spirit of it,
17 the engagement that goes on with it.

18 And I think that's what I heard as well. Maybe a
19 couple of specific questions, one per Mr. Nelson. In terms of, and it
20 may be in some of the record that I just haven't had a chance to sort
21 of delve into in terms of the comments as I look at it.

22 But in terms of recognizing is there a particular
23 approach you might suggest in terms of within the scope of this policy
24 that adapting it to recognize Native Hawaiian organizations, is there a
25 particular approach of a suggestion you might have in that regard?

1 MR. NELSON: Sure. Let me just acknowledge that
2 some agencies attempt to develop policies that address both groups
3 because of the similarities, and others address them separately.

4 We provided comments I believe in 2015 about a
5 way, one approach which would have allowed you to address Native
6 Hawaiian organizations in this policy statement. We recognize and I
7 think the response we received from staff was that this policy was
8 meant to be specifically for Tribes.

9 We recognize and acknowledge that your
10 Commission has the opportunity and the right to treat them separately,
11 but I would just simply say that without addressing NHOs, you will
12 have a specific gap from my perspective in dealing with a unique party
13 in the 106 process.

14 I think the model you have here is good for dealing
15 with Tribes, and I would just simply suggest that if you would like to
16 proceed without including NHOs here, that there may be a sort of a
17 basis within this statement to transfer some of these same principals
18 and create a like policy for Native Hawaiian organizations.

19 We would also be happy to provide specific
20 recommendations and a follow up letter on how you might do that.

21 CHAIRMAN BURNS: Okay. Great, good. And one
22 of the other areas, and I might ask others to join in, I think one of the
23 challenges I think this staff has, and it's part of I think the learning
24 curve in the engagement, has been circumstances in which where the
25 responsibility in many respects rests primarily on the federal agency.

1 But with a licensing agency, what you have is, and I
2 think a number of our colleagues here have noted that point, is you
3 have particularly, you know, for a new, if it's a new license, but also
4 expanded license. I think Ms. Westra sort of noted that.

5 You have that engagement of you have a licensee or
6 a potential applicant who is on, is going to conduct or is planning or is
7 seeking authorization to conduct the activity on particular land.

8 And so what I'm trying to say, get at is are there
9 particular things in terms of if that's going to come to the agency, that
10 early engagement by that Applicant or that other entity, I think that's
11 one of the things where I think the NRC has had to have somewhat of
12 a learning curve.

13 And I maybe start with you, Mr. Nelson, and I would
14 ask our other colleagues on the panel to chime in if they wish.

15 MR. NELSON: Yes, I think you've touched on a very
16 important point, sort of a part the process we often refer to as the pre-
17 application process.

18 And I think our recommendations bout educating and
19 advising applicants about the Section 106 review process and your
20 requirements in meeting them, and having those applicants
21 understand those requirements early on, at their early stages of
22 planning, even before they may approach your agency, stands to,
23 positions them to better understand and anticipate what issues they
24 may face from our perspective on historic properties and other things
25 going forward.

1 I think also there's always a challenge in applicants
2 reaching out to Tribes directly, as you noted in my comments. Tribes
3 enjoy and expect a government to government relationship, but we do
4 understand and know that often, many of the decisions that affect
5 ultimately where a license may be are strongly influenced by actions
6 the applicant takes before they even come to your agency for approval
7 or guidance.

8 So there are multiple, there are a variety of different
9 ways to approach that. We think that encouraging interaction
10 between applicants and Tribes where Tribes are willing to have that
11 interaction is one way.

12 We think NRC also coming in at those earliest stages
13 where they can and being part of that conversation is very useful as
14 well.

15 CHAIRMAN BURNS: Great. Anybody else like to
16 comment on that? Ms. Westra?

17 MS. WESTRA: I would agree with Reid to some
18 extent. I mean, a relationship with the Applicant can be very helpful,
19 but it's not always possible. You know, I feel like we have a very
20 good relationship with Xcel Energy, but we don't always agree on
21 issues or the resolution of issues.

22 So in that regard, we would expect the NRC as the
23 licensing agency to be more, I guess, what's the word I'm looking for,
24 you know, react more stronger to our issues.

25 But I would think also at the regional level from your

1 NRC regions, you know, I would assume what some of the actions
2 coming up might be. And so that's an opportunity for those regional
3 liaisons or even at the headquarters to start reaching out, identifying
4 potentially impacted Tribes and start reaching out.

5 The earlier, the better. I mean, it's a great goal to
6 work with the Applicants, but it's not always feasible, it doesn't always
7 have the best outcome.

8 CHAIRMAN BURNS: All right, anyone else?

9 MR. HAEMER: Yes, Chairman, I think you raised a
10 very good point for Applicants, particularly if you're advising them as
11 they come in at the beginning of a project, they're very interested in
12 knowing what's the licensing process, what are the, you know, what is
13 it going to take to get through it.

14 And the normal expectation is it's going to be, you
15 know, you're going to do an environmental report, you're going to do a
16 safety report, there's going to be a Part 2 hearing, and you're going to
17 provide the Applicant as they go through the process they can budget,
18 they can get the partners to go through that and understand who
19 they're going to have to deal with.

20 With, like anything else, when there's uncertainty or
21 lack of clarity about what the scope of a Tribal consultation process is,
22 I mean, that also, that hurts both parts, both the Applicant and the
23 Tribe. Neither know exactly what it is that they're going to have to
24 interact on and what the scope of what the rules of the game are
25 going to be for getting through it.

1 So I think the early consultation of the pre-application
2 process and the clarity as to what the scope of the consultation
3 process that's going to be for a particular licensing action will be very
4 helpful to both parties early on.

5 CHAIRMAN BURNS: Okay.

6 MR. ARNOLD: I think I would also add that one of
7 the things that we oftentimes see is that regardless of whatever the
8 undertaking is and the action is that's proposed, that oftentimes
9 people tend to just focus on reservation boundaries and looking at
10 okay, so we'll deal with the Tribes that are within this box, you know,
11 confined within these boundaries discounting the breadth of ties to
12 lands that may be adjacent, could be very nearby or could be
13 hundreds or even thousands of miles away.

14 And so I think that needs to be keyed to it. And the
15 other is that, as I said in my remarks, I mean, personality is a big
16 driver. You can have all the great rules you want and put it down on
17 paper. But it's truly the commitment of the people that are doing it
18 and making sure that we're having some good communication.

19 And I rely on a good friend and colleague that
20 oftentimes mentioned how, you know, communication is not
21 consultation. And so we need to remember that just by reaching out
22 to Tribal people, you're not maybe going to get the responses that you
23 may desire.

24 You also have to be cognizant that nuclear issues are
25 really oftentimes foreign to many Tribes. And so they don't have the

1 experience of interacting with that, compounded by the limited
2 resources that Tribes have and now trying to engage in all these
3 things.

4 So there's a myriad of things I think to consider. But
5 again, I just think it's very, very important to make sure there's a
6 commitment. Is there on all parties, and the understanding is there
7 as well.

8 CHAIRMAN BURNS: Okay, thanks very much.
9 Thanks. Commissioner Svinicki.

10 COMMISSIONER SVINICKI: Well good morning,
11 welcome. My thanks to each of you for being here and the
12 presentations that you've shared, but also to all of the individuals from
13 the organizations and groups you represent who have obviously
14 shared a lot of expertise and insight as NRC was going through the
15 process of developing a proposed final Tribal Policy Statement.

16 In my study of the record, as the Chairman
17 mentioned, I'm not through all of maybe each detailed letter that came
18 in. But I've looked at the body of comments sent not only by your
19 organizations but other groups, and I would hope that you would feel
20 that you have definitely shaped aspects of this Tribal Policy Statement
21 moving from the initial draft to where we sit today and what the
22 Commission has in front of it, and I think you have strengthened it in
23 very, very constructive ways.

24 I appreciate the pragmatism that I think all of you
25 have espoused that there is a point at which in order to have a better

1 understanding of exactly what you might need to change or modify,
2 you need to put something in place and then begin to work what I
3 consider to be our complimentary processes that are really the fuller
4 expression of the policy statement.

5 It's the protocol documents that we have in place, our
6 guidance which some of you have spoken to, and then overall our
7 implementation planning. I think it might have been Mr. Nelson who
8 mentioned that, you know, there's budgeting and planning that will go
9 behind the full panoply of actions that we'll take here.

10 But I really felt that the issues that were brought
11 forward by you and others had helped us to make the policy manual
12 which really is such a key partner to the policy statement.

13 You know, I struggle with policy statements because I
14 think there can be an over-reliance on espousing some high level
15 thing. It really is the individual actions we take.

16 I appreciate that Ms. Westra said, you know, flexibility
17 is going to be very key here. And I think that Mr. Arnold talked about
18 the fact that we will need to, there's no one size fits all and we're going
19 to need to approach both consultation and outreach processes which
20 are different with the kind of we need to bring that flexibility to this
21 process.

22 So on the one hand that creates this tension that the
23 policy statement wants to say that broad overarching set of principles.
24 I do think that where comments were made that they were not fully
25 incorporated, I think there is a real opportunity to take the important

1 input and maybe make it manifest more in the implementation and the
2 protocols and other aspects of our process because the policy
3 statement is not meant to be the entirety of what we're moving forward
4 on.

5 But I think given some of the practical time lag in
6 updating policy statements, it's important that we meet the right
7 intention with the policy statement. But I think where we can have
8 things and documents that the staff would be able to change a bit
9 more responsively, it's a kind of a dynamic we have between the
10 Commission and the staff.

11 There are certain tiers of types of documents that they
12 can change as they gain insights in this process. So, you know, with
13 that, some of you touched in your presentations on what are going to
14 be the key lessons that we need to be remembering once the policy
15 statement is in place, we do continually look at guidance and other
16 subsidiary documents.

17 I know we'll continue to do that, the staff will continue
18 to do that. Is there anything that any of you would like to highlight as
19 once the policy statement is in place, how do we best use and make
20 the best use out of having that in place moving forward?

21 Are there key lessons learned or other things? And
22 again, some of you have touched on this, you know, we need to keep
23 our commitment there and we need to have the flexibility, but would
24 anyone like to comment on that moving into the paradigm where the
25 policy statement is in place? Mr. Nelson.

1 MR. NELSON: Sure, thank you. I'll be very brief
2 and just reiterate that I think that's an excellent question and suggest
3 that you look at opportunities to train your staff to go out outside of the
4 context of individual licensing actions and actually communicate with
5 Tribal communities about the policy statement, share your ideas, hear
6 their values, and then make sure that they understand what comes
7 after the policy statement.

8 The fact that you all recognize that there are
9 implementation steps that are necessary, I think that news would be
10 welcomed. And we would be happy to assist you in any training you
11 might provide. There are a variety of ways to train about the Section
12 106 review process and other things as well that we would be happy
13 to help you with.

14 COMMISSIONER SVINICKI: Thank you. Did
15 anyone else -- Ms. Westra.

16 MS. WESTRA: I would totally agree with what Reid
17 just said, training of the staff is key. And you have a lot of already
18 very knowledgeable NRC staff people who have been engaged with
19 Tribes for a long time. Region 3, you have Allan Barker, you have a
20 number of people here at headquarters.

21 And, you know, you could do some kind of peer
22 exchange or whatever so that, and it's not that hard. You just have to
23 start the engagement process by picking up the phone and start
24 building that relationship.

25 You know, it's just finding those opportunities to start

1 the conversation with the Tribes and just recognizing that Indian
2 Tribes are governments. They're not clubs or non-profit
3 organizations, they're Tribal, they're governments.

4 But also reaching out to the Tribes is equally
5 important. Doing some outreach maybe through existing venues like
6 meetings and the like, you know, participating in the National
7 Transportation Stakeholders Forum and other opportunities like that
8 so that you start the dialogue between the Tribes and the NRC staff.

9 MS. WESTRA: Thank you. Anyone else? Mr.
10 Arnold.

11 MR. ARNOLD: Yes, I think there's, you'll find there's
12 definitely interest from the Tribes that we want to engage in
13 communication. And oftentimes I think it's a disconnect because
14 maybe people don't know how to either reach out to us in whatever
15 way, and again, it's not cookie cutter.

16 So everybody's unique. And it's just like all of us are
17 unique and relationships can be built and what have you. But I think
18 that if we don't, one, initiate it and that was kind of my point early on
19 when talking about the, you know, waiting for that fastest computer,
20 we need to get off dead center.

21 We need to get this thing initiated. And let's do it
22 recognizing what those six principals are. We want to try to adopt the
23 policy that's going to engage Tribes and hopefully Native Hawaiian
24 organizations as well. But we need to start somewhere.

25 And I think once we do that and we start reaching out,

1 then it's key. The other is with the training, and I echo that
2 wholeheartedly. But I think it's also unique that everybody needs to
3 understand, again, not cookie cutter. We're all unique. And so just
4 because it works in one area doesn't mean it's going to work in the
5 other.

6 Consistency is key obviously. And then most
7 importantly, we don't want to let this die on the vine. I mean, you
8 know, there are so many policies out there. Be mindful that Tribes
9 then now have to try to embrace all these different things and the
10 myriad of things that they have, responsibilities that they have to do.

11 And so it's not only NRC, but now you imagine all the
12 other federal agencies in there, and imagine, you know, if you guys
13 think you get a lot of paperwork, you ought to look in a Tribal office
14 who gets it from everybody else, and now we have to sort through with
15 limited resources.

16 So it's very, very challenging. But again, I think we're
17 in a good place, we can make it happen. You have, I think, some
18 commitment and support from key people that hopefully will be able to
19 get this thing moving forward.

20 COMMISSIONER SVINICKI: Thank you. Would
21 anyone else like to add to that?

22 MR. HAEMER: Yes.

23 COMMISSIONER SVINICKI: Yes, Mr. Haemer.

24 MR. HANSEN: If I may, Commissioner, I think I have
25 somewhere here my iPhone 4, and I think next month is going to be

1 the month I'm finally going to commit to an upgrade, inspired by
2 today's assessment.

3 I would just reiterate that I think that where the
4 Commission needs to pay a lot of attention going forward is both the
5 methods of outreach to the extent they're working or not working. I
6 mean, I have my own views about the Department of Energy's
7 consent based sighting initiative and whether or not that was an
8 effective or an ineffective use of outreach dollars.

9 But that's I think the sort of thing that as an agency,
10 as a Commission level that you can look and see whether or not
11 you're getting the bang for your buck on your outreach dollars.

12 And certainly in the area of consultation, particularly
13 the ones that aren't as well defined as the National Historic
14 Preservation Act or some of the others where they were very well
15 defined, Commission involvement, Commission oversight.

16 However, that comes as certainly something that I
17 would advocate because it is going to be unique and it is going to be
18 important, and probably you should start doing it before I upgrade my
19 iPhone 4.

20 COMMISSIONER SVINICKI: Okay, thank you.
21 Thank you, Mr. Chairman.

22 CHAIRMAN BURNS: Okay, thank you,
23 Commissioner. Commissioner Baran?

24 COMMISSIONER BARAN: Well, thanks. I want to
25 start by thanking the panelists for being here today and for providing

1 comments on the proposed Tribal Policy Statement.

2 I think we've really benefitted from the feedback we've
3 gotten from all of you and your involvement in the process. And I
4 agree with all of you that the development of the Tribal Policy
5 Statement is a very valuable effort.

6 I think the agency's recognition of these key principals
7 is just crucial, our trust responsibility, our commitment to our
8 government to government relationship with Tribes, outreach, timely
9 consultation, coordination, and encouraging state recognized Tribes to
10 participate in our processes.

11 There's value in formalizing these high level principals
12 so that we can, so they can guide and facilitate our Tribal interactions.
13 So I think there's a lot here to be proud of in the work that's been
14 done.

15 I want to ask though about one of the few aspects of
16 the Tribal Policy Statement that is controversial, and it's a change
17 from the proposed policy statement. And here's the new language, I'll
18 just quote it directly.

19 "As an independent regulatory agency that does not
20 hold in trust Tribal lands or assets or provide services to federally
21 recognized Tribes, the NRC implements its trust responsibility by
22 ensuring that Tribal members receive the same protections under its
23 implementing regulations that are available to other persons."

24 That's the new language since the proposed version.
25 And as Ms. Westra touched on, the general counsel of the Prairie

1 Island Indian Community commented on this concept and his reaction
2 was very negative.

3 His view is that, "The trust responsibility must mean
4 more than solely complying with existing statutes and regulations."
5 He goes on, "In order for the trust responsibility to have any vitality,
6 federal agencies must exercise a higher responsibility when taking
7 action that may affect a Tribe."

8 And he notes that different federal courts have come
9 out differently on this question. What do you all think about this
10 language? Do you have a reaction to it? I would like to hear it.

11 MS. WESTRA: Well, since I wrote that letter, it's
12 something that we at Prairie Island have talked about for a long time.
13 And we don't care for it because, and I'm probably not articulating this
14 in the best way possible but when you say that the same protections
15 available to other persons, it kind of implies that the Tribe is not on the
16 same playing field as the public.

17 So in other words, you're bringing the Tribe up to the
18 public. And I appreciate the fact that you've changed it from the
19 public to other persons, but I think some thinking needs to be done on
20 that other persons.

21 And as I mentioned in my comments this morning, or
22 earlier this morning that of course we understand that, you know,
23 health regulations of course apply to Tribal people. So what we're
24 most concerned about is archeological and cultural resource
25 protection where we feel like the agency needs to do more, go a little

1 bit further than just protection of the general public.

2 But putting that aside for the moment, that statement,
3 other persons, that phrase I think just needs to be just maybe what
4 you need to say is just we meet our trust responsibility by ensuring
5 that our regulations and standards are met, period, rather than saying
6 by including available to other persons, that part of it.

7 But to me it just, it doesn't have a, I don't know if you
8 want to say something, Richard, but it doesn't have a good feeling to
9 it. You know, it just sort of implies that the Tribes are at this level and
10 the general public is here, and that we're going to now we're going to
11 make sure that the Tribes are treated the same, the Tribal people are
12 treated the same.

13 COMMISSIONER BARAN: But when I read the
14 sentence in context, the language preceding it is very good general
15 language about the trust responsibility.

16 And when I get to this sentence, it feels like a
17 narrowing to be that well, but we're an independent regulatory agency
18 and what that means is trust responsibility is just we treat you like
19 everyone else.

20 MS. WESTRA: Yes.

21 COMMISSIONER BARAN: That's not a very
22 expansive view of trust responsibility, at least as I read it. And that's I
23 guess what you're getting at a little bit. Do you have thoughts on
24 this?

25 MR. ARNOLD: Of course I do. You know, it's very

1 interesting as a Tribal person looking at when we're trying to deal with
2 something, again, that's very complex but affects things that are, and I
3 can only rely upon my traditions.

4 So when I go back to my traditions and I'm looking at
5 if things affect other people that maybe don't know about our
6 resources, for example, as I said, we personify the land, we personify
7 the resources. Those are our relatives.

8 If they get sick, we get sick. If they go away, we
9 vanish. You know, we rely upon everything. And so when you're
10 talking about trust responsibility and oftentimes I guess I learn all
11 these cool words like trust doctrine and all this other stuff when you
12 read it.

13 But it seems like that when you're trying to compare
14 us to everybody else who doesn't fall within the trust doctrine and you
15 want to bring us up to their, that standard? I mean, there's a
16 disparity.

17 And I think that what we're looking at is the need for
18 parity, and I agree with you wholeheartedly that there is a narrowing.
19 When you're talking about this, hey we're all, you know, we want to
20 make things great and whatever else.

21 Oh, and by the way, we've done this to appease you
22 kind of thing, and I think that's not the message that we want to give.
23 I think that what we want to do, we want to say as Heather had
24 suggested that we can be very concise in sharing the information.
25 We can then tell folks that we want to fulfill our obligation as the NRC,

1 period.

2 And then we've achieved what needs to happen.
3 Sometimes, as I've learned, and again I have to rely upon my culture,
4 you know, we're taught about when I was born I was given so many
5 breaths for my life. And they say to use those words very gingerly
6 and with great conviction because if you don't, you're going to need
7 those breaths sometimes.

8 And when you're on your dying, you're getting ready
9 to die and you say oh man, I sure wish I could breathe more and had
10 some more breaths to live, well you just wasted those and wasted
11 that.

12 So I think we need to be careful in the words that we
13 say, picking those words, making sure that they're going to meet the
14 needs of the Tribes, making sure that we're all focused, singing the
15 same song basically and achieving the same results in the best
16 interests of the Tribes.

17 MR. NELSON: Thank you. I don't know the extent
18 to which we may or may not have commented on that language, but
19 hearing you say it now it seems overly narrow.

20 And I guess what I would acknowledge are two
21 things. First of all, while I understand in some ways our agencies are
22 not dissimilar. We implement regulations, you implement regulations.
23 And so I would acknowledge that your trust responsibilities may be
24 different than those of other agencies that own land and properties
25 and have other authorities.

1 But I would suggest a couple things. First of all,
2 acknowledge that you implement, while you implement and directly
3 oversee your own regulations, you also implement our regulations and
4 a great many other regulations that are required by the federal
5 government, and as such you have broader trust responsibilities than
6 just simply the implementation of your own regulations.

7 I would also say that our agency, while we have very
8 specific regulations about all of the, that address all of the participants
9 in the Section 106 review process. We have stated very clearly that
10 the ACHP has a trust responsibility to Tribes.

11 And that's partly in how we implement our regulations,
12 the role that Tribes play, and the deference we give to their views.
13 And that's a really important part. One of the key components of our
14 trust responsibility is to give deference to the Tribe's views where the
15 regulations provide them the opportunity to do that.

16 And that's a higher standard than simply the standard
17 that's supplied to states and applicants and others. We must
18 essentially accept as fact their views and their positions and the
19 values they place on important places.

20 So I'm not suggesting, I'm not going to suggest
21 specific edits here but I would suggest that there may be ways you
22 could augment that to perhaps acknowledge the broader
23 responsibilities your agency has and perhaps the greater deference
24 that you need to provide for Tribes' views.

25 MR. HAEMER: Yes, Commissioner, I was just going

1 to add to the previous discussion that the language strikes me, as a
2 lawyer, as being hornbill law out of a case, probably FERC that is
3 quoted from.

4 And like any time you take the hornbill law, you've got
5 to apply it to the individual responsibilities of the agency. And if you
6 take it from, and you look at something like EPA instead of FERC,
7 there is a regulatory agency, and Mr. Hansen might be able to
8 comment a little bit more, they do a little bit more in terms of their trust
9 responsibility of ensuring the Tribal program, I don't want to say
10 paternalistic but fulfill the responsibility as the government that has a
11 subordinate government that it takes care of.

12 It fulfills that trust responsibility by providing a little
13 more than just simply go do the right thing, but a little more advice and
14 guidance. And I think, and applying that then by principal to the NRC,
15 the NRC within the Atomic Energy Act, you know, reasonable
16 assurance of public health and safety, there's not a lot of room for that
17 kind of assistance or outreach or consultation with the Indian Tribes.

18 But on other things, environmental issues, NEPA,
19 that's certainly an area. So I think you can go back and ask the staff
20 look a little bit in terms of whether or not that hornbill law has been
21 disconnected too far from its roots.

22 There are probably aspects of it that they mean and
23 aspects of it that could be broadened as we've been discussing.

24 COMMISSIONER BARAN: Let me just ask a quick
25 question in closing on this. We're not the only independent agency

1 that either is looking at having a Tribal Policy Statement or that has
2 one.

3 I'm not aware of other independent agencies that are
4 articulating this legal position in their Tribal Policy Statements. Are
5 any of you aware of an independent agency's Tribal Policy Statement
6 that is making this legal assertion? In the policy statement?

7 MR. ARNOLD: I can't think of any offhand.

8 MR. NELSON: You know, I have not done a survey
9 recently, but I would guess that more often than not, Tribal Policy
10 Statements do not attempt to articulate specifically what the agency's
11 trust responsibilities are.

12 I know that's an important issue, but it's also a very
13 complicated one as you can vouch.

14 COMMISSIONER BARAN: A more high level
15 discussion? Okay, thank you.

16 MR. HANSEN: Yes, Commissioner. I wanted to
17 make a comment. You know, I find it unique to a certain extent that
18 the NRC reflects that it doesn't have holdings. And I think from the
19 National Tribal Air Association perspective, we're really concerned
20 with the airshed and what's moving in the air.

21 So I think there's a real fine line between
22 differentiating the responsibility focused on holdings or not. And we
23 want to continue to emphasize that what moves through the airshed
24 has just as much significance.

25 COMMISSIONER BARAN: Okay, thank you. Thank

1 you.

2 CHAIRMAN BURNS: Well, thank you all for the
3 presentations and the discussion this morning. We'll all take a brief
4 break. We'll reassemble at 10:40, in about seven minutes from now
5 and hear the staff presentation. Thanks again.

6 (Whereupon, the above-entitled matter went off the
7 record at 10:32 a.m. and resumed at 10:41 a.m.)

8 CHAIRMAN BURNS: I'll call the meeting back to
9 order, and we'll welcome our second panel from the NRC staff. And
10 I'll turn it over to Glenn Tracy, Deputy Executive Director for
11 Operations. And Glenn, I'll let you do further introductions and start
12 us off as you see fit.

13 MR. TRACY: Thank you. Slide two, please. Good
14 morning, Chairman Burns, Commissioner Svinicki, Commissioner
15 Baran. For the benefit of those in the audience who are listening, I'm
16 Glenn Tracy, the Deputy Executive Director for Materials, Waste,
17 Research, State, Tribal Compliance Administration and Human
18 Capital Programs. Slide three, please.

19 We're very pleased to be here today to discuss the
20 staff's efforts and development of the NRC's Tribal Policy Statement
21 including how the staff addressed and incorporated the diverse views
22 of stakeholders regarding the proposed statement's content.

23 Currently, the NRC interacts with Indian Tribes on a
24 case by case basis and has no formal policy governing its interactions
25 with federally recognized Tribal governments.

1 The Commission has upheld statutory obligations to
2 consult with Tribes under federal law and has acted in a manner
3 consisted with the spirit of certain presidential initiatives pertaining to
4 Tribal consultation and coordination.

5 However, the NRC has not previously formalized an
6 agency-wide Tribal Policy Statement. Formalizing a statement
7 recognizes the significant interests Tribes have in the NRC's
8 regulatory process for licensing and regulation of radioactive
9 materials.

10 It also signifies the NRC's commitment to the unique
11 relationship the federal government has with federally recognized
12 Tribes, as well as establishes guidelines for staff and notifies everyone
13 involved including Tribes, licensees and other interested parties of the
14 NRC's policy principals expressed in the Tribal Policy Statement.

15 In addition, the policy statement that is before the
16 Commission identifies a designated official for Tribal consultations. In
17 my capacity as one of the deputy executive directors for operation, it
18 will be potentially my honor to serve as that designated official.

19 The initiative to develop a Tribal Policy Statement
20 demonstrates the agency's commitment to engaging in a government
21 to government relationship with and upholding our trust responsibility
22 to federally recognized Tribes and is consistent with related executive
23 orders and presidential memoranda.

24 Slide four, please. The NRC staff with me today will
25 address the following topics, Commission direction, NRC priorities and

1 budget implications, policy statement scope and implementation,
2 policy principals, and comment disposition.

3 Marc Dapas, our NMSS Office Director will provide
4 some context for the current initiative, historical information related to
5 the NRC's consultation and coordination with Tribal governments.
6 Slide five, please.

7 MR. DAPAS: Thank you, Glenn. Let me start out
8 with a brief overview of the NRC's historical practices for Tribal
9 interaction to provide some context for the current initiative which we
10 think will lead to more effective interactions with Tribes. Slide six,
11 please.

12 The Office of Nuclear Material Safety and
13 Safeguards, or NMSS, plays an integral role in inter-governmental
14 outreach to and consultation with Tribal governments as well as states
15 and localities.

16 The NRC does not hold in trust any Tribal lands or
17 assets. As such, Tribal interactions have been limited compared to
18 those of other federal agencies.

19 However, the NRC recognizes its federal trust
20 responsibility to Tribes in the context of its authorizing statutes, and in
21 terms of consultations is committed to government-to-government
22 relationships with Tribes.

23 As Glenn noted, to date the NRC has interacted with
24 Tribal governments on a case by case basis and before the initiative
25 to develop a policy statement did not have a formal policy governing

1 its interactions with federally recognized Tribal governments.

2 This case by case approach can be traced back to a
3 1987 Commission paper titled Policy Issues Raised in Meeting with
4 Prairie Island Dakota Indian Representatives.

5 At that time, the Commission approved the staff's
6 recommendation not to develop a formal policy in cooperation with
7 federally recognized Tribal governments and to continue addressing
8 Native American issues on a case by case basis and cooperating with
9 Tribal governments on a government to government basis.

10 Historically, the NRC has had limited, albeit
11 significant, Tribal interactions. Many federally recognized Tribes
12 have an interest in public health and safety and environmental
13 protection associated with NRC regulatory activities that include
14 uranium recovery and commercial nuclear power as well as nuclear
15 waste transportation, disposal, and storage activities.

16 Most noteworthy of course is the longstanding and
17 unique relationship that the NRC has with the Prairie Island Indian
18 Community whose reservation is located just a few hundred yards
19 from the independent spent fuel storage installation, or ISFSI, at the
20 Prairie Island Nuclear Generating Station.

21 The NRC has entered into multiple memorandums of
22 understanding with the Prairie Island Indian Community whose
23 representatives have routinely observed inspections of the nearby
24 reactor in ISFSI.

25 In fact, I've had the opportunity to personally interact

1 with Tribal leadership and others including Heather Westra who you
2 heard from in the previous panel in my former role as the NRC Senior
3 Resident Inspector at the Prairie Island Nuclear Generating Station
4 having been assigned to that site shortly after the ISFSI was
5 constructed.

6 The Commission has also worked closely with Tribes
7 on matters relating to long term storage initiatives and the advanced
8 notification to Tribal governments with respect to the transportation of
9 certain shipments of nuclear waste. Slide seven, please.

10 As Glenn also indicated, the NRC has acted in a
11 manner consistent with the spirit and intent of certain presidential
12 initiatives pertaining to Tribal consultation and coordination.

13 For example, in response to Executive Order 13175
14 entitled Consultation and Coordination with Indian Tribal Governments
15 issued by President Clinton in November of 2000, the NRC sent the
16 Office of Management and Budget a letter, excuse me, a letter
17 indicating, "In exercising its regulatory authority, this agency acts in a
18 manner consistent with the fundamental precepts expressed in the
19 order."

20 The agency has also complied with statutory
21 provisions such as the National Historic Preservation Act in consulting
22 with Tribal governments. In addition, the NRC has maintained
23 working relationships with Tribal governments and inter-Tribal
24 organizations that have an interest in NRC regulated activities,
25 routinely participating in Tribal conferences hosted by federal partners

1 and Tribal organizations.

2 These working relationships and NRC staff
3 participation in Tribal sponsored conferences have been effective in
4 achieving positive outcomes in terms of encouraging and facilitating
5 Tribal involvement in the areas over which the Commission has
6 jurisdiction.

7 Notwithstanding the NRC Tribal Policy Statement in
8 setting forth principles and establishing agency-wide guidelines to be
9 followed by the NRC staff should promote effective and consistent
10 government to government interactions with American Indian and
11 Alaskan Native Tribes but also encourage custom tailored approaches
12 to consultation and coordination that reflect the circumstances of each
13 situation and the preference of each Tribal government.

14 It is the NRC's expectation that all program and
15 Regional Office consultation and coordination practices will adhere to
16 the NRC Tribal Policy Statement.

17 I would like to turn it over to Dan Collins who will
18 provide an overview of Commission direction with respect to priorities
19 to consider in developing the subject policy statement and discuss
20 budget implications related to implementation of that statement. Slide
21 eight, please.

22 MR. COLLINS: Thank you, Marc. I am the Director
23 of the Division of Material Safety, State, Tribal, and Rulemaking
24 programs and NMSS, the NRC's inter-governmental liaison program
25 supporting the agency's efforts to engage in outreach with state,

1 Tribal, and local governments is managed out of my division.

2 As such, my organization has the lead in working with
3 the other program office representatives to develop an agency-wide
4 Tribal Policy Statement stemming from Commission direction May of
5 2012. Next slide, please.

6 During a December 2008 briefing on the uranium
7 recovery program, the Commission directed the NRC staff to develop
8 and implement an internal protocol for interaction with Native
9 American governments that would allow for custom tailored
10 approaches to address both the NRC and Tribal interests on a case
11 by case basis.

12 The Commission also directed the staff to assess
13 what policies other federal agencies have for interaction with Native
14 American Tribal governments and to report those findings to
15 determine the efficacy of an NRC Tribal Policy Statement.

16 The staff responded to this Commission direction in
17 SECY-09-0180 entitled US Nuclear Regulatory Commission
18 Interaction with Native American Tribes. Communicating the staff's
19 determination that the NRC's case by case approach to interaction
20 was effective, and met the needs of the Commission and the Tribes.

21 The staff had concluded that Tribal interactions would
22 not benefit from a formal Tribal Policy Statement at that time. The
23 NRC staff did however develop NUREG-2173 entitled NRC Tribal
24 Protocol Manual Guidance for NRC Employees as an internal protocol
25 for interacting with Tribal governments. Next slide, please.

1 Since then, the NRC has engaged in an increasing
2 number of Tribal consultations related to the licensing of uranium
3 recovery facilities in the western part of the country stemming in part
4 from the heightened Tribal interest in the NRC's licensing of uranium
5 recovery facilities along with related increased Tribal consultation
6 activity.

7 The Commission issued a staff requirements
8 memorandum, or SRM, in May of 2012 directing the NRC staff to
9 provide a proposed policy statement and protocol on consultation with
10 Tribal governments.

11 The Commission specified that the policy statement
12 should serve as a high level foundation for the NRC Tribal protocol
13 and should echo the language and spirit of relevant presidential
14 memoranda and executive orders. Next slide, please.

15 In its SRM, the Commission directed the staff to do
16 the following when developing the proposed policy statement. First,
17 use the existing Tribal Protocol Manual and the NRC staff's ongoing
18 efforts outlined in SECY-09-0180 as a starting point and a basis for
19 developing the proposed policy statement of protocol.

20 Second, seek input from the Tribes and the public on
21 how to improve the existing manual. Third, to clearly articulate the
22 NRC's actions, must be in accordance with its governing statutes and
23 regulations in the policy statement and protocol. Next slide, please.

24 Fourth, respect and reflect sensitivity to the distinction
25 made in executive orders and statutes between Indian Tribes who are

1 federally recognized and those who are not in the policy statement
2 and protocol.

3 Fifth, indicate that the NRC will conduct outreach to
4 state recognized Tribes on a case by case basis in the policy
5 statement and protocol. Sixth, explore additional opportunities within
6 our current regulatory processes for information sharing and outreach
7 to state recognized Tribes.

8 Next slide, please. And finally, to make the protocol
9 prominently available on the NRC's public website. In being fully
10 responsive to the Commission direction, the NRC staff engaged in a
11 deliberative process with extensive stakeholder involvement and
12 outreach to develop the policy statement. Paul Michalak will describe
13 this process in more detail. Next slide, please.

14 Having provided a high level overview of how the
15 NRC Tribal Policy Statement has evolved, let me discuss budget
16 implications relating to implementation of the statement.

17 With respect to resource utilization, there has been
18 increase in Tribal outreach over the past few years, starting in 2010
19 with the development of the NRC Tribal Protocol Manual, support of
20 National Historic Preservation Act Section 106 consultations, and
21 liaison staff training.

22 Existing resources have been used to develop the
23 Tribal Policy Statement and revise the Tribal Protocol Manual,
24 including extensive outreach to Tribal governments and inter-Tribal
25 organizations.

1 In addition, existing resources have been used to
2 support the Tribal advanced notification rule as well as develop Tribal
3 protocol training, the Tribal Policy Statement implementation plan, and
4 Tribal mapping tools.

5 NRC staff will shift the focus of Tribal liaison
6 resources from developmental efforts to implementation efforts
7 including Tribal liaison support of outreach and communication to
8 Tribes related to regulatory actions throughout the agency.

9 The NRC staff also anticipates that for many of the
10 developmental tasks that have been accomplished, limited resources
11 will be needed to maintain them.

12 The staff anticipates that the current and requested
13 budgets will be sufficient to cover anticipated Tribal outreach efforts.
14 Statutory obligations to consult including National Historic
15 Preservation Act Section 106 consultations are already accounted for
16 in the appropriate business lines as they relate to the licensing of both
17 materials and reactors.

18 Next slide, please. However, the NRC staff cannot
19 precisely predict at this point how many consultations will take place
20 under the Tribal Policy Statement on issues that have a substantial
21 direct effect on one or more Indian Tribes.

22 Dependent upon the nature, extent, and frequency of
23 requested consultations, additional staff resources may be required.
24 Provision of these resources would be achieved through application of
25 the agency's ad shed process.

1 A noteworthy example of planned outreach includes
2 Tribal interaction related to the process of reviewing Wyoming's
3 application to become an Agreement State. Next slide, please.

4 The Commission has approved an NRC Tribal Policy
5 Statement implementation plan, and we will revise that plan as
6 needed upon the approval of and publication of the final Tribal Policy
7 Statement.

8 The implementation plan aligns with the Tribal Policy
9 Statement, identifies commitments, and enumerates specific actions
10 that correspond with each of the policy principles.

11 The implementation plan, coupled with the publication
12 of an annual report, provide for agency accountability in adhering to
13 the principles and tenants of the Tribal Policy Statement.

14 As part of implementation, the staff will monitor its
15 activities and resource expenditures to identify any trends and keep
16 the Commission informed of budgetary impacts.

17 Beyond 2017, future budget needs will be addressed
18 through the planning, budgeting, and performance management
19 process. Paul Michalak will now discuss in more detail the
20 development of the Tribal Policy Statement and its scope. Next slide,
21 please.

22 MR. MICHALAK: Thanks, Dan. I am currently the
23 Branch Chief for the Agreement State Programs branch in NMSS and
24 formerly served as the Branch Chief for the Federal, State, and Tribal
25 Liaison Branch which led the effort to develop the NRC Tribal Policy

1 Statement.

2 I'm going to discuss the following topics, the
3 development and scope of the policy statement, the six principles in
4 the statement, comments received, and how those comments were
5 addressed in the statement. Next slide.

6 As Dan noted, the Commission initiated this task in
7 2012. We have been working diligently since that time to produce the
8 policy statement that was provided to the Commission last month for
9 its approval.

10 After the NRC staff received direction for the
11 Commission, we formed an internal working group in the summer of
12 2012 to ensure that all program office views were represented.

13 The working group consisted of representatives from
14 NMSS, the Office of New Reactors, Office of Nuclear Reactor
15 Regulation, Office of Nuclear Security and Incident Response, and the
16 Office of the General Counsel.

17 This allowed a wide range of staff experience to
18 inform the Tribal Policy Statement. In October 2012, the NRC
19 published the Federal Register Notice to solicit suggestions for the
20 development of proposed Tribal Policy Statement as well as
21 comments on the NRC's Tribal Protocol Manual which was developed
22 back in 2009.

23 It was important for us to solicit comments from Tribal
24 governments and organizations along with other interested parties
25 before ever putting pen to paper.

1 The NRC engaged with Tribal governments and other
2 interested parties by one, collaborating with the National Congress of
3 American Indians to discuss mass mailings, to conduct rather mass
4 mailings to federally recognized Tribes.

5 Two, participating in Tribal meetings hosted by Tribal
6 organizations and other federal agencies. These meetings included
7 attendees from federally recognized and state recognized Tribes.
8 And three, placing advertisements in select Tribal publications and
9 online media outlets.

10 As part of our efforts, we received Tribal Policy
11 Statements, we reviewed rather Tribal Policy Statements of executive
12 departments, their related agencies, and other independent agencies.
13 Findings from this review were provided to the Commission along with
14 the proposed policy statement in 2014. Next slide.

15 The proposed NRC Tribal Policy Statement was
16 approved by the Commission and published in the federal register for
17 comment on December 1st, 2014. It was consistent with the
18 language of Executive Order 13175 and was intended to cover a wide
19 range of Tribal consultations and outreach conducted by NRC staff.

20 After the December 2014 publication of the proposed
21 policy statement in the federal register, the NRC engaged in internal
22 and external collaboration and outreach to inform the final Tribal
23 Policy Statement.

24 The NRC staff also sought comments on the final
25 policy statement through participation in external conferences and

1 presentations, periodic telephone calls, and teleconferences.

2 The staff continued to participate in standing Tribal
3 meetings hosted by federal partners and Tribal organizations and
4 initiated additional outreach to Tribal leadership through various
5 regional and affiliated Tribal leadership councils.

6 And so here we are today discussing the final NRC
7 Tribal Policy Statement submitted to the Commission for approval.

8 Next slide.

9 Let me spend a few minutes discussing the scope of
10 the Tribal Policy Statement. It is based on Commission direction, the
11 results of the staff's review of other federal agency Tribal policies,
12 alignment with Executive Order 13175, the staff's evaluation of public
13 comments received in response to the October 2012 and December
14 2014 Federal Register notices, comments received from NRC offices,
15 and information received during outreach initiatives as well as informal
16 dialogue with Tribal governments and organizations.

17 The policy statement accounts for limited authority
18 NRC has as the independent regulatory agency under the Atomic
19 Energy Act of 1954 as amended. However, it provides agency-wide,
20 high level guidance to promote effective government to government
21 interaction with federally recognized Tribes.

22 The policy statement is not restricted or limited to a
23 particular program. For example, it is not limited to uranium recovery
24 licensing but covers all areas within the NRC's regulatory jurisdictions
25 including reactors and materials.

1 The Tribal Policy Statement is also not limited to any
2 particular statute, but rather is based on the US Constitution, treaties,
3 statutes, executive orders, and judicial decisions. It can inform our
4 compliance with Tribal consultation requirements and specific statutes
5 such as the National Historic Preservation Act.

6 In this respect, it is similar to other federal agency
7 Tribal Policy Statements and is consistent with broader efforts in the
8 Executive Branch to establish effective and meaningful consultation
9 and coordination with federally recognized Tribes as articulated in
10 Executive Order 13175.

11 Furthermore, the Tribal Policy Statement is not limited
12 to specific regulatory programs or statutory obligations to consult with
13 Tribal governments such as the National Historic Preservation Act, but
14 rather it covers all interactions the NRC and federally recognized
15 Tribes related to actions within the agency's regulatory purview. Next
16 slide.

17 The Policy Statement also encourages state
18 recognized Tribes to participate in the NRC's regulatory process as
19 appropriate. This could include participation in NRC led public
20 meetings and providing comments for NRC licensing actions and
21 rulemakings.

22 For instance, as noted earlier, the degree of
23 interaction with individual tribes will vary depending on the
24 circumstances. The Policy Statement sets high level guidance to
25 establish consistency but still allows flexibility for custom tailored

1 approaches depending on the circumstances.

2 Through appropriate management controls and
3 oversight, the NRC will ensure that all program and regional office
4 consultation and coordination practices are consistent with the Tribal
5 Policy Statement.

6 Consistent implementation of the Statement is
7 important in terms of enhancing our relationship with federally
8 recognized Tribes and promoting more effective consultation,
9 outreach and interaction with Tribal governments.

10 We have longstanding and well established
11 relationship with state governments via the Agreement State program
12 and State Liaison Officer program along with governing documents
13 including policy statements and management directives that provide
14 guidance to NRC staff, states, and licensees.

15 The Tribal Policy Statement will allow us to provide
16 similar yet distinct guidance to NRC staff, Tribes, and other interested
17 parties including licensees regarding the unique relationship the NRC
18 has with Tribes. Next slide.

19 Now let me turn to the Policy Statement principles
20 before the Commission, providing some context and explanation for
21 each one. Policy principle one, the NRC recognizes the federal trust
22 relationship with and will uphold its federal trust responsibility to Indian
23 Tribes.

24 The NRC shares the federal government's unique
25 trust responsibility with and trust responsibility to Indian Tribes.

1 Under the Federal Trust Doctrine, the United States and the individual
2 agencies of the federal government owe a fiduciary duty to Indian
3 Tribes.

4 The nature of that duty depends on the underlying
5 substantive laws such as treaties, statutes, and agreements creating
6 the duty. The NRC exercises its trust responsibility in the context of
7 its authorizing statutes including the Atomic Energy Act of 1954, the
8 Energy Reorganization Act of 1974, the Nuclear Waste Policy Act of
9 1982, the Low Level Radioactive Waste Policy Act of 1985, and the
10 Uranium Mill Tailings Radiation Control Act of 1978 as amended.

11 As an independent regulatory agency that does not
12 hold in trust Tribal lands or assets or provide services to federally
13 recognized Tribes, the NRC implements its trust responsibility by
14 ensuring that Tribal members receive the same protections under its
15 implementing regulations that are available to other persons.

16 Policy principle two, the NRC recognizes and is
17 committed to a government to government relationship with Indian
18 Tribes. The NRC recognizes the right of each Indian tribe to self-
19 governance and supports Tribal sovereignty and self-determination.

20 The NRC recognizes Tribal governments as
21 dependent domestic sovereign nations, independent from state
22 governments, with separate and distinct authorities with inherent
23 sovereign powers over their members and territory, consistent with
24 applicable statutes and authorities.

25 Policy principle three, the NRC will conduct outreach

1 to Indian Tribes. The NRC will conduct outreach to keep Indian
2 Tribes informed about the policies actions and plans as appropriate
3 related to its regulatory actions that have substantial direct effects on
4 one or more Indian Tribes.

5 The NRC will participate in national and regional
6 Tribal conferences and summits hosted by federal agencies, Tribal
7 governments, and Tribal organizations as appropriate.

8 The NRC will encourage Tribal governments to
9 communicate their preference to NRC staff during outreach activities
10 and will seek to provide information about opportunities for Tribal
11 participation in NRC meetings and advisory committees concerning
12 NRC regulatory actions that have substantial direct effects on one or
13 more Indian Tribes as appropriate.

14 Policy principle four, next slide. The NRC will
15 engage in timely consultation. The NRC will provide timely notice
16 and consult in good faith with Tribal governments on NRC's regulatory
17 actions that have substantial direct effects on one or more Indian
18 Tribes.

19 Tribal officials may also request that the NRC engage
20 in Tribal consultation with them on matters that have not been
21 identified by the NRC to have substantial direct effects on one or more
22 Indian Tribes.

23 The NRC will make efforts to grant such requests,
24 taking into consideration the nature of the activity at issue, past
25 consultation efforts, available resources, timing issues, and other

1 relevant factors.

2 The NRC will establish early communication and
3 begin consultation as soon as practicable. The NRC will consult in
4 good faith throughout the agency decision making process and
5 develop and maintain effective communication, coordination, and
6 cooperation with Indian Tribes.

7 The NRC representatives for consultation with Tribal
8 officials or representatives will be of an appropriate rank, and the level
9 of interaction will be commensurate with the circumstances. The
10 appropriate level of interaction will be determined by a discussion
11 between the NRC and Tribal governments and program office
12 consultation procedures and guidance.

13 Participating Tribal and NRC representatives will
14 serve as respective decision makers based on the established agenda
15 and to the extent possible.

16 Policy principle five, the NRC will coordinate with
17 other federal agencies. When the Commission's action involves
18 other federal agencies, the NRC will perform its Tribal consultation
19 jointly with other federal agencies as appropriate and to the extent
20 possible.

21 This recognizes the limited time and resources that
22 Tribal governments and federal agencies may have and aligns with
23 broader Executive Branch initiatives.

24 Policy principle six, the NRC will encourage
25 participation by state recognized Tribes. The NRC recognizes the

1 distinction between Indian Tribes who are federally recognized and
2 those who are not.

3 The NRC will reach out to states to identify the
4 appropriate state recognized Tribes to invite to participate in its
5 regulatory process including opportunities related to rulemaking,
6 licensing, and decommissioning. Next slide.

7 On December 1st, 2014, the NRC published a
8 proposed policy statement in the federal register for public comment.
9 The NRC received nine comment submissions including two
10 comments from representatives from federally recognized Tribes, two
11 representatives from inter-Tribal organizations, a federal agency, an
12 electric utility company, and three individuals who did not provide an
13 organizational affiliation.

14 The comments generally fell within the following
15 categories, the NRC's trust responsibility as a federal agency,
16 suggested changes to the language of the Tribal Policy Statement,
17 Tribal outreach and consultation, and the NRC's government to
18 government relationship with tribes.

19 Based on comments received in these categories,
20 staff made changes to the proposed policy statement to provide
21 greater clarity. I'll now describe those in more detail. Next slide.

22 The definition of the term consultation has been
23 revised to provide clarification and to allow greater distinction from
24 other NRC interactions with Tribes. The revision stems from
25 comments submitted by multiple commenters including the Advisory

1 Committee on Historic Preservation suggesting there should be
2 greater clarification.

3 As a result, staff has revised the definition of
4 consultation to mean efforts to conduct meaningful and timely
5 discussions to the NRC and Tribal governments on the NRC's
6 regulatory actions that have substantial direct effects on one or more
7 Indian Tribes.

8 It is worth noting here that the NRC did receive a
9 comment recommending that this agency define substantial direct
10 effects. The use of substantial direct effects is consistent with the
11 language used in Executive Order 13175 which does not define the
12 term.

13 Since the Policy Statement covers a vast range of
14 regulatory activities, the staff has not defined substantial direct effects
15 in the policy statement. The NRC will consider including criteria in
16 future guidance documents to determine whether an activity has a
17 substantial direct effect on one or more tribes.

18 The consultation process may include but is not
19 limited to providing for mutually agreed protocols, timely
20 communication, coordination, cooperation, and collaboration. Next
21 slide.

22 The process provides opportunities for appropriate
23 Tribal officials or representatives to meet with NRC management or
24 staff to achieve mutual understanding between the NRC and Tribes
25 with respect to their interest and perspectives.

1 In addition, multiple commenters suggested there
2 should be greater clarification regarding the distinction between
3 consultation and other Tribal interactions. The Advisory Council on
4 Historic Preservation specifically expressed concerns that interactions
5 could be confused with more formal government to government
6 consultations and suggested that the NRC define the term
7 interactions.

8 Next slide. As a result, the NRC staff has included
9 the following definition for interactions, reciprocal actions involving the
10 NRC and Indian Tribes and may include but is not limited to outreach,
11 consultation, coordination, training, and informal exchanges with
12 Indian Tribes.

13 Interactions may be oral or written, and can take
14 place remotely through electronic media or in face to face meetings.
15 Next slide.

16 The staff also added a definition for outreach. The
17 term outreach has been defined in the discussion section of the
18 Federal Register Notice in an effort to promote clarification and allow
19 greater distinction from Tribal consultation.

20 Outreach refers to NRC staff efforts to inform Indian
21 Tribes about the agency's actions and plans. Outreach include
22 sharing information and encouraging Tribal governments to
23 communicate their concerns and interests to NRC staff. Next slide.

24 The definition of trust responsibility has been revised
25 to provide additional clarification on the way the NRC fulfills its trust

1 responsibility to Indian Tribes. The revision stems from comments
2 from multiple sources.

3 As discussed earlier, the NRC exercises its trust
4 responsibility in the context of its authorizing statutes including the
5 Atomic Energy Act of 1954 as amended and implements its trust
6 responsibility by assuring the Tribal members receive the same
7 protections under its implementing regulations that are available to
8 other persons.

9 Lastly, in response to comments, the discussion of
10 government to government relationship has been modified to clarify
11 Tribal sovereignty. The clarification underscores the NRC's
12 commitment to Tribal sovereignty which applies not only to Tribal
13 people but also to Tribal land.

14 The policy now reads, "The NRC recognizes Tribal
15 governments as dependent domestic sovereign nations, independent
16 from state governments, with separate and distinct authorities with
17 inherent sovereign powers over their members and territory consistent
18 with applicable statutes and authorities.

19 The policy principles related to each of the
20 aforementioned concepts have been revised accordingly to reflect the
21 changes made. During discussions of the NRC's Tribal Policy
22 Statement, you have heard us reference Tribal consultations related to
23 the licensing of uranium recovery facilities.

24 While the NRC Tribal Policy Statement covers a
25 broad range of NRC activities, there are statutes that specifically

1 require federal agencies to conduct tribal consultation.

2 One example is the National Historic Preservation Act
3 that has a statutory requirement for federal agencies to conduct Tribal
4 consultations to help identify, evaluate, and develop mitigation
5 measures for historic properties that may have been affected or may
6 be affected by federal undertakings.

7 Such undertakings for the NRC include uranium
8 recovery licensing actions. Diana Diaz-Toro from the Environmental
9 Review Branch will now provide a status update related to the
10 National Historic Preservation Act, or NHPA, Section 106 Tribal
11 Consultations.

12 MS. DIAZ-TORO: Thank you, Paul. Good morning
13 Chairman, Commissioners. The next slide, please. Section 106
14 process of the National Historic Preservation Act requires federal
15 agencies to take into account the effects of their undertakings on
16 historic properties and provide the Advisory Council on Historic
17 Preservation an opportunity to comment.

18 The NRC carries out Section 106 obligations through
19 consultation with different stakeholders. These include the State
20 Historic Preservation Officers, Tribal Historic Preservation Officers,
21 and other federal, state, and local government agencies. Next slide,
22 please.

23 In addition, Section 106 related consultations can
24 include Tribal governments and Native Hawaiian organizations that
25 attach religious and cultural significance to historic properties that may

1 be affected by the undertaking.

2 The applicant or the licensee, other interested parties
3 which could include private land owners, historic preservation groups,
4 and state recognized tribes in the area, and the public.

5 The NRC must comply with Section 106 obligations
6 prior to making its decisions on the license application. As I
7 mentioned, consultation is central to the Section 106 process.

8 The National Historic Preservation Act requires
9 federal agencies to ensure that the consultation process provides
10 Indian Tribes and Native Hawaiian organizations a reasonable
11 opportunity to identify its concerns about historic properties, advise on
12 the identification and evaluation of historic properties, articulate its
13 views on the undertakings and facts on such properties, and
14 participate in the development of potential resolutions to adverse
15 effects on historic properties that may be eligible for listing on the
16 National Register of Historic Places.

17 Our outreach activities in support of our efforts to
18 comply with the Section 106 obligations are also consistent with the
19 Tribal Policy Statement principles. Next slide, please.

20 Over the past several years, the NRC staff has seen
21 an increase in its activities with respect to its obligations under the
22 Section 106 process. We have specifically seen this increase for the
23 licensing reviews of uranium recovery facilities.

24 The complexity of this NHPA Section 106
25 consultations can vary from project to project. There are several

1 factors that can contribute to this complexity. One factor is the
2 number of consulting parties participating in the process.

3 For example, we have seen an increase in the
4 number of Tribes interested in each uranium recovery project from a
5 few Tribes prior to 2009 to a current average of 20 Tribes per project.

6 Another factor that can influence the duration and
7 complexity of the Section 106 consultations is the scope of the
8 licensing action, for example, whether the Applicant or licensee is
9 requesting a license for the construction and operation of a new facility
10 which would typically involve significant land absorbing activities or an
11 amendment that is administrative in nature.

12 The location of the facility associated with the
13 proposed license application such as in areas that are known to be the
14 Aboriginal homelands of Indian Tribes or near sites that are
15 considered sacred can also affect the complexity of the Section 106
16 consultations. Next slide, please.

17 To facilitate our Section 106 reviews, the NRC staff
18 continues to identify and implement activities to enhance our review
19 process. We are in the process of finalizing the interim staff guidance
20 for conducting Section 106 process for uranium recovery licensing
21 actions.

22 While the guidance is primarily intended for the NRC
23 staff, it also provides useful information for all participants in the
24 Section 106 process. In addition, we have established a partnership
25 with the Advisory Council on Historic Preservation.

1 Through this partnership, the Advisory Council on
2 Historic Preservation has established a dedicated liaison that works
3 directly with the NRC staff by providing assistance with Section 106
4 reviews of specific licensing actions as well as providing training and
5 guidance.

6 This concludes my presentation, and I'll now turn it
7 back to Glenn. Next slide, please.

8 MR. TRACY: Thank you, Diana, and my colleagues
9 at the table, and also in the audience for their diligent work in this
10 particular product and this important matter. We're very grateful for
11 the opportunity to have listened to our colleagues in the first panel and
12 to brief you on our efforts to develop the Agency's Tribal Policy
13 Statement, and we look forward to your comments and questions.
14 Thank you.

15 CHAIRMAN BURNS: Okay, thank you. Thank you
16 all for the presentations. I have a number of questions that may go
17 more toward implementation and other activities that we actually carry
18 out under the auspices of the Policy Statement but actually activities
19 that we've been working on for a number of years in terms of
20 development of the Protocol Manual but also other outreach we've
21 needed to do over the years.

22 One thing, and Marc, maybe I'll start with you in terms
23 of having just come from a Region, perhaps are there any
24 observations you have in terms of implementation of their
25 relationships with Tribal authorities coming out of the Region and

1 areas where you think we might need to look at in terms of developing
2 consistency or enhancing consistency in that kind of awareness
3 outreach and engagement?

4 MR. DAPAS: Thanks, Chairman. I was just going to
5 comment that I think outreach is very important. I think it goes to
6 what you heard from the first panel that developing relationships with
7 the individuals that are here engaging in the Tribal communities.

8 But I think that's very important, and as we transition
9 from the resources that we have focused on development of the
10 statement to a continuing our outreach efforts, I think that that's, you
11 know, and that's different from consultation.

12 Consultation is a more formal kind of government to
13 government. But the outreach is important ensuring that members of
14 the Tribal community have awareness of our programs and processes
15 and opportunities to engage us in those processes.

16 So I think that it's important that we continue to
17 engage in substantive outreach efforts with the Tribes. And I've seen
18 that in the three Regions that I've been involved with, Region of
19 course I, II, and IV, and most recently Region IV.

20 But we have over the course of the last several years
21 increased those outreach efforts, principally in connection with
22 developing the policy statement, but there is the recognition that we
23 need to continue with the concerted effort with that aspect of how we
24 engage in interactions with the Tribes.

25 CHAIRMAN BURNS: Okay. One of the things that I

1 would ask, I think it came up in Dan's presentation, the discussion of
2 resource constraints, although, you know, we're always in a position
3 we have to effectively and prudently manage resources.

4 But if perhaps you can enlighten me in terms of where
5 you see the resource challenges in the various types of engagements,
6 whether it's outreach or more formal consultations.

7 Where are those? Where do you see as the
8 challenging areas in terms of resource availability or resource
9 application?

10 MR. TRACY: I think you comment, Dan.

11 MR. COLLINS: Yes, thank you, Chairman. So as I,
12 in terms of just maintaining the program, we think that the currently
13 budgeted resources will be sufficient to maintain the infrastructure for
14 the program. I think the challenge for us is going to be looking
15 forward is trying to precisely predict the resources that would be
16 needed under consultation. And that's the question mark for us at
17 this point.

18 CHAIRMAN BURNS: And what pushes that? How
19 is that question posed? Why does that question arise?

20 MR. COLLINS: Because at this point we don't have
21 a good way to precisely predict how many consultations under the
22 policy statement we would have to engage in.

23 CHAIRMAN BURNS: Okay.

24 MR. DAPAS: I just had one comment. I think as we
25 develop the budget, we look at what have historically been the

1 expenditures in that area, and that can inform your budget
2 assumptions. But as Dan indicated, with the formal adoption of the
3 Tribal Policy Statement and that additional outreach to educate Tribal
4 communities on ways they can get involved in our regulatory
5 processes, we don't know if that will translate to requests for more
6 consultation.

7 As we indicated in our remarks, Tribes can engage
8 and request consultation not just associated with matters that have a
9 substantial direct effect on one or more tribes, but may choose to
10 engage in consultation in other regulatory matters, and then we would
11 have to look at it in the unique aspects of the case, look at timing
12 resources, what consultation may have occurred previously.

13 So it's in that context that we are not sure to what
14 degree may we see increased request for consultation.

15 CHAIRMAN BURNS: Okay.

16 MR. TRACY: I'll just add that Victor McCree, Mike
17 Johnson, and I along with the staff here have specifically discussed
18 this particular matter, Chairman. And upon approval of the policy and
19 learnings that we would have as we move forward in implementation,
20 we will be carefully monitoring with our leadership across the agency
21 and keeping you and the Commission fully informed of what
22 implications through the appropriate budgetary process as we move
23 forward and learn implementing this clear call for consultation and
24 government to government activities.

25 CHAIRMAN BURNS: One other thing, and maybe,

1 Diana, you can address this. And my question is for the first panel.
2 This comes to the issue of engagement with, in the Section 106
3 process, early engagement. Clearly there's an agency responsibility,
4 but the activities ultimately are activities for which a, usually a private
5 entity are going to seek to seek approval from the NRC for.

6 Can you perhaps elaborate for me how we're trying to
7 -- I think we've taken some steps. I think we've had some learning
8 from the 106 consultation process, particularly in the uranium recovery
9 area. Can you describe for me how we have perhaps shifted and
10 what we think we've learned over the last few years about the various
11 engagements and how to get potential applicants involved.

12 MS. DIAZ-TORO: Sure. So, over the past several
13 years, and still now, we've had several challenges in certain, with
14 engagements with the Tribes.

15 One of the things that we've tried to do to reach out
16 are getting involvement from the Tribes early on, as soon as we know,
17 we receive a letter of intent, for example, from an applicant, and we
18 know that there are, is more certainty that the application is coming in,
19 we've been sending advanced notifications to the Tribes that we know
20 are interested in being involved in the Section 106 reviews and the
21 NHPA, as soon as that letter of intent comes in.

22 In other matters, in more general matters, we are,
23 have conducted outreach activities in the Northern Plains for
24 educational awareness purposes.

25 Paul's group in the liaison, well, previous group in the

1 liaison group, has outreach and conducted outreach activities over
2 there.

3 I have been, for the past few years, been going to the
4 NMA meeting, the National Mining Association meeting, and provided
5 presentations at the National Mining Association regarding the Section
6 106 process and what we have learned.

7 I have encouraged applicants to reach out to the
8 Tribes early on when they conduct our archaeological surveys so that
9 they engage early on and understand what the Tribe's inputs are,
10 what they are concerned about, what the importance of that land is so
11 that that information is included, hopefully, as part of the
12 environmental report that is submitted to the NRC, and the information
13 is submitted to the NRC in the, as part of the license application.

14 And the other thing that we've done is we've
15 published this Interim Staff Guidance for uranium recovery, licensing
16 reviews and, in the, that Guidance has an appendix that outlines
17 activities that the applicants can take on to facilitate our Section 106
18 reviews.

19 CHAIRMAN BURNS: Okay. Thanks.

20 MR. MICHALAK: I can actually --

21 CHAIRMAN BURNS: Sure.

22 MR. MICHALAK: We've had some outreach efforts
23 with Tribal historical preservation officers, particularly out in the
24 Wyoming area and out in the Midwest, to try to understand how they
25 want to communicate.

1 And it comes back to the previous message from the
2 external panel, that it's not a one size fits all.

3 So just because you're talking to one historical
4 preservation officer doesn't mean the guy or woman, you know, three
5 states over or three reservations over is going to communicate the
6 same way.

7 So we've had a couple of trips out there now where
8 we're trying to develop protocols with individual Tribal historic
9 preservation officers.

10 And that way, when we have a licensing action, we'll
11 know how they want to communicate, and it might make it smoother.

12 CHAIRMAN BURNS: Okay, thanks. We've got a
13 few, about a minute left here, but one other thing, maybe for you,
14 Paul, in terms of in evaluating, not only comments, but we also, you
15 said we looked at other agencies and their approaches to this.

16 Is there, how did that feed back into what we're, what
17 the staff is proposing as its policy statement?

18 Is there other particular aspects of those policies that
19 we adopted or that we found useful to model in our statement?

20 MR. MICHALAK: I think many of the policy principals
21 really are mapped from other federal agencies.

22 And the other day, just to, as a background, I was
23 reviewing the FAA's and the FCC's, and I can actually see literally
24 some of the same language from those policy statements taken and
25 put into our policy statements.

1 So I would say the entire policy statement, all six
2 principals, in one form or another, come from, I mean, we didn't
3 reinvent the wheel here. Okay? But we've made it ours. And so
4 we have an NRC, or proposed final NRC policy statement.

5 But I would say much of it has been taken from other
6 agencies, and it's helped inform what we've done.

7 CHAIRMAN BURNS: Okay. Thanks. Thanks.
8 Commissioner Svinicki.

9 COMMISSIONER SVINICKI: Well, thank you all for
10 your presentations, and the previous panel was very fair, and I think
11 perhaps generous in their understanding that participating in a
12 process and submitting comments doesn't always mean that your
13 exact proposal is incorporated exactly as you presented it.

14 So I felt that they were all very kind to us in
15 acknowledging that, although it isn't in all dimensions the policy
16 statement that they themselves might write, in general, I felt the sense
17 was, it is a good fortifying action and it would be a favorable thing for
18 the agency to put it into place.

19 So I want to say, I had a similar reaction when I read
20 the paper that you've put before the Commission now. I thought that
21 where you could make accommodation and certainly in clarifications
22 where it was pointed out that maybe we weren't as clear as we could
23 otherwise be.

24 I felt that there was a very genuine approach to the
25 comment you received, and in general, I think we've got a better

1 product than we might otherwise have had just if we, as Paul said, just
2 put pen to paper ourselves.

3 Paul, I might follow up on the Chairman's question
4 though. You mentioned, the Chairman had asked you as his final
5 question, we looked at other agency policy statements in this area.
6 You mentioned FCC.

7 So did you look at another, of not just other federal
8 agencies, but other independent commissions, Tribal policy
9 statements or whatever form they have, and did you feel that in
10 general we were not terribly different from the way they approached
11 these issues?

12 MR. MICHALAK: No. I think other than
13 Commissioner Baran's point of the language difference in the first
14 policy principal, that no, we're pretty consistent through it, throughout,
15 with the other agencies.

16 COMMISSIONER SVINICKI: Okay. So if we looked
17 at the policy, Tribal policy statements of other independent
18 commissions, we would likely see a lot of parallels there to --

19 MR. MICHALAK: A lot of parallels. Not completely.
20 I mean, some of them --

21 COMMISSIONER SVINICKI: Sure. Sure. It's not
22 going to read verbatim.

23 MR. MICHALAK: Yes.

24 COMMISSIONER SVINICKI: Okay, thank you. One
25 of the points I felt was emphasized in the previous panel was not we

1 should work to build relationships.

2 I see it as encompassing that wisdom that says, you
3 know, don't be the first time that you communicate with someone be a
4 specific instance where you have something challenging or difficult to
5 address.

6 As the staff looks at various mechanisms and
7 opportunities to do that kind of more general relationship building,
8 what do you see as those mechanisms at a high-level, and how would
9 you prioritize it, again, reflecting on the Chairman's statement that
10 there's always a choice between allocating resources in different
11 ways? Could someone speak very generally to that?

12 MR. DAPAS: I would just offer a comment which
13 echoes my remarks earlier. I think the importance of outreach, and
14 as we acknowledged in the presentation, attending various
15 conferences and forums and participating, similar to like we do with
16 the Organization of Agreement States, or the Council of Radiation
17 Control Program Directors. And we have participated in those
18 conferences and conducting targeted outreach.

19 I think that that is the means by which you develop a
20 relationship, and then you know what matters are of interest to
21 particular Tribal communities.

22 So when something comes up that you know may be
23 of interest, you can outreach to them because you've already
24 established those relationships.

25 So in my view, I cannot underscore a more significant,

1 more significantly, the importance of outreach and building those
2 relationships.

3 COMMISSIONER SVINICKI: Okay. So it sounds
4 like it wouldn't be all that different from what you might, how you might
5 approach a number of things where you say, I'll first go to those
6 opportunities where I could really multiply my presence, where there
7 might be multiple entities to be engaging with.

8 So we're, it sounds like we're just going to have a
9 fairly straightforward set of criteria through which we would prioritize
10 the use of resources available in that area.

11 The other thing that I heard emphasized in the
12 previous panel was training. I know that training for liaison officers
13 has already been going on for some time.

14 But once the policy is issued, what does the staff
15 envision in terms of training of NRC staff in particular?

16 MR. COLLINS: So we have a training module that's
17 been developed, and it's now on iLearn for all staff to be able to
18 access, and we will continue to advertise that. So --

19 COMMISSIONER SVINICKI: Would there be staff
20 whose responsibilities are such that they would specifically be pointed
21 to that training, saying, you know, your responsibilities day-to-day
22 really make that this is a training that we need you to take as opposed
23 to having it be more just available to the staff?

24 MR. COLLINS: We have identified a population of
25 staff members that this would be a priority for. So the answer to that

1 is yes.

2 And then if I, Commissioner, if I might echo back or
3 add some clarification to the last question, we have also for the, for my
4 division, started building a travel plan for the entire year so that we
5 can figure out how we allocate the travel dollars.

6 COMMISSIONER SVINICKI: Okay. Thank you.

7 MR. TRACY: I'd, just I want to add that Victor, Mike,
8 and I would also want to emphasize strongly to the office leadership
9 and to the agency's leadership, the importance of this particular policy,
10 once approved by you and the Commission.

11 And then ensuring that leadership is emphasizing not
12 only its use and implementation, but the importance of the training so
13 it's not just going out in some iLearn perspective, but a global.

14 And I'll also add, if you don't mind, for the prior
15 question, that even using existing tools such as our Regulatory
16 Information Conference, and having a new and special emphasis and
17 interaction with our Tribes, and those type of opportunities are new but
18 not unique means of the toolbox in enabling and fostering that
19 interactions we see.

20 COMMISSIONER SVINICKI: Thank you. Dan, I
21 might ask you a kind of a specific question. I'm not, I'm not asking
22 you to kind of create any commitments here at the table, but you did
23 use an example in your presentation of where we might kind of modify
24 our plan to outreach in light of the policy statement on a specific
25 action. It was the Wyoming request for Agreement State status.

1 I'd like you to describe, in general terms, why you
2 highlighted that, and what things might be under contemplation with
3 the staff. And I guess I would ask you to answer through this
4 paradigm.

5 The existence of a Commission policy statement on
6 Tribal issues does not create a different legal standard for us under
7 the Atomic Energy Act in terms of assessing whether or not what
8 Wyoming's proposed Agreement State program would look like,
9 whether the adequacy of that under the AEA provision does not
10 change because we have a policy statement.

11 So I'm asking you to answer and say, you know, we
12 will have published these principals and yet we still have, under the
13 law, a standard for assessing the Wyoming proposal.

14 Can you talk about how the staff is going to kind of
15 see both of those things through a lens, and then a plan, any
16 particular additional consultation or outreach it's going to do regarding
17 the Wyoming proposal specifically?

18 MR. COLLINS: Right. So I highlighted that
19 particular example in my remarks specifically just as a way of
20 acknowledging that that's something that we know is coming in terms
21 of the Wyoming request for an agreement, and that there is, there are
22 Tribes that are interested in that.

23 So just trying to say kind of, just explicitly, that we're
24 going to, we're planning to do outreach and communication with any
25 interested Tribes related to that, with respect to a formal consultation.

1 That's something we still need to work through Office
2 of General Counsel to try and clarify the bounds of it of how that would
3 go forward.

4 COMMISSIONER SVINICKI: Okay. So with the,
5 highlighting that as an example, you weren't meaning to telegraph any
6 specific decisions that had been made at this point because, of
7 course, Wyoming is a state that has this opportunity under the Atomic
8 Energy Act.

9 And so we can't have a fundamentally different
10 paradigm without being subject to a concern that we're somewhat
11 arbitrary and capricious in our decision making.

12 I've been here for a number of voting to approve
13 agreement, states becoming Agreement States. So I think we're
14 going to have to have continuity, but also acknowledge that the policy
15 statement is in place, and I look forward to how you're going to do
16 that. Thank you, Mr. Chairman.

17 Oh, wait. Did, Marc, did you want to say something?

18 MR. DAPAS: Just one quick point. I think using
19 Wyoming as an example there underscores the importance of making
20 sure potential Tribal communities that might have interest in our
21 regulatory processes are aware of those and know how they could
22 avail themselves and provide comments like other members of the
23 public when we make the Agreement State application public and
24 invite comments.

25 That would be an example of ensuring they have

1 awareness of what those processes are because they, we know they
2 may have particular interest in that matter.

3 COMMISSIONER SVINICKI: Okay. Thank you.
4 Thank you, Mr. Chairman.

5 CHAIRMAN BURNS: Thank you. Commissioner
6 Baran.

7 COMMISSIONER BARAN: Thanks. Well, thanks to
8 all of you for your hard work on this Tribal policy statement.

9 Paul, I know you've moved to another branch, but the
10 branch you left that worked on this, the liaison branch, just a terrific
11 group of people. You have a hard time finding any group of people
12 as committed and enthusiastic as that group.

13 And overall, I think this is an important step forward,
14 the policy statement that has been developed.

15 I think, as I look at it, I think the vast majority of this is
16 very, very good, and what I want to explore in the next few minutes is
17 whether we should make a modification to the little bit that's not so
18 good, in a way that would improve it as we adopt it and it's heading
19 out the door, hopefully.

20 And so I want to follow up with the questions that I
21 asked earlier on this new language that wasn't in the proposed policy
22 statement, but that ended up in the draft final or proposed final,
23 whatever you want to call it.

24 And I'll read it again just quickly so we all know what
25 we're talking about, which is, as an independent regulatory agency

1 that does not hold in trust, Tribal lands or assets or provide services to
2 federally recognized Tribes, the NRC implements its trust
3 responsibility by ensuring that Tribal members receive the same
4 protections under its implementing regulations that are available to
5 other persons.

6 Why stake out this position in the policy statement?

7 MR. DAPAS: I'll offer a thought, Commissioner. In
8 looking at some of the other Tribal policy statements that other
9 agencies have, you know, and understanding the language, and you
10 heard Paul speak to that in his presentation and in response to a
11 question.

12 We did note some differences there. For example,
13 the Federal Energy Regulatory Commission uses verbs like subject to
14 limitations, as I understand it.

15 And we thought, consistent with our principals of good
16 regulation, we should be as open and transparent as we can.

17 So that's why we thought it was based on input from
18 our Office of General Counsel, appropriate to caveat trust
19 responsibility, recognizing that we have to act consistent with our
20 governing statutes and associated rules.

21 And an example of that would be the admission
22 contention process. You know, we cannot treat, as I understand it,
23 we have to treat Tribal members consistent with members of the
24 public in that there is a very proscribed process you have to go
25 through.

1 So that would be an example of consistent with our
2 governing statutes and processes.

3 And the other thing I'd like to point out is when we talk
4 about consultation, it is a government-to-government relationship or
5 meeting, and I've been involved in a number of government-to-
6 government meetings, and that is different than interactions you have
7 with members of the public. So I would just offer that by way of
8 reference.

9 So that was some of the thought processes that went
10 into why we caveated that trust responsibility, recognizing that we
11 don't have trust for lands or assets or provide services and, I don't
12 know if you wanted to provide any further comment, or Glenn.

13 MS. DOANE: Yes.

14 MR. TRACY: Provide any further comment?

15 MS. DOANE: Yes, well I would because it's gotten a
16 lot of attention today and I want to make sure that it's well understood.

17 So first of all, I want to say, of course the legal staff, I
18 think a lot of the things that were said by the other panel are
19 recognized, that we have to recognize the customs and the
20 perspectives and the laws of the Tribes, and that each Tribe is unique
21 and that the statement was not meant to reflect on that at all.

22 That in the, in our policy, as I think Marc was hinting
23 at, what we tried to do is we tried to define both the responsibility,
24 which is very formal, deeply mandated activities, from relationship,
25 which allows us to do other things with respect to our interactions.

1 And so --

2 COMMISSIONER BARAN: I appreciate that
3 distinction, but on this question of whether or not, you know, there's a
4 legal principal here that is in the draft final.

5 And I looked at a bunch of cases, and courts have
6 come out both sides of this issue. Often though, the context is not
7 really quite on point of monetary damages under specific statutes like
8 the Tucker Act or the Indian Tucker Act.

9 And there's a fair bit of scholarly debate about the
10 wisdom of limiting the trust responsibility in this way, and so I think
11 that just kind of raises the basic question of, why take a controversial
12 legal position in a high-level policy statement that's going to potentially
13 antagonize Tribes, when the whole purpose of the policy statement is
14 to strengthen those relationships? Why have it in there?

15 MS. DOANE: Well, I think, I think, I think there's
16 room for describing this differently, but the last thing I wanted to point
17 out is probably the most important, which is that this reference was to
18 be clear that the procedures for legally mandated activities in 10 CFR
19 Part 2 referring to all persons.

20 So that that's where that language is taken from, and
21 it's very clear in our legal proceedings that this is how it's interpreted,
22 that all persons are applicable to our interactions with the Tribes in the
23 context of this trust responsibility.

24 And so the importance of that, in our mind, was to not,
25 to give a signal that that reference to all persons, and all persons is,

1 while it does, like Marc said, it does have to do with contentions, but it
2 also talks about all persons may petition for rule-making. All persons
3 can file comments. All persons can participate in proceedings.

4 So it was really just a signal that that reference in Part
5 2 is applicable to our interactions. It wasn't meant to --

6 COMMISSIONER BARAN: I agree it's a signal. I'm
7 just not sure it's the signal we should be sending.

8 I mean, other, well, let me just, and you maybe can
9 chime in, because I have a, I have a bunch of questions on this.

10 I mean, other independent agencies, as Paul alluded
11 to, and you mentioned, Marc, FERC, FCC, are not taking this
12 approach. I looked at their Tribal policy statements. They're right
13 here.

14 And these are independent regulatory commissions.
15 They discuss their trust responsibility in these documents. But they
16 don't include this legal position in their Tribal policy statements.

17 And so, for me, it again, kind of goes back to this
18 question. Why are we going to enshrine this controversial legal
19 position in our Tribal policy statement when other independent
20 regulators aren't doing so?

21 I mean, the case cited for this basic proposition is a
22 case involving FERC. And FERC doesn't even include it in their
23 Tribal policy statement. Why would we do it? Do you want to --

24 MS. OLMSTEAD: I'll just give you some background.

25 CHAIRMAN BURNS: Just before you start speaking,

1 Joan, identify yourself and your office affiliation for the record please.

2 MS. OLMSTEAD: Sure. I'm Joan Olmstead. I
3 work in the Office of General Counsel. I worked on the Tribal policy
4 statement. I do quite a bit of NHPA issues too.

5 So I just wanted to give you some background that
6 the staff was following the direction more, or we felt we were following
7 the direction more of the SRM for the SECY for COMWDM-12-0001, in
8 that May 22, 2012 SRM we were directed to use, formulating the
9 policy statement in accordance with its governing statutes and
10 regulations.

11 Also it was directed to have a high-level foundation for
12 the protocol and echo the spirit and the relevant presidential
13 memorandum executive orders.

14 So when we're looking at developing the language in
15 there, we were being, trying to be explicit, I guess, maybe for
16 describing what we thought the trust responsibility was under a
17 statutory authority.

18 COMMISSIONER BARAN: Well, the Supreme Court
19 has said that, at least in the context of monetary damages, a Tribe
20 must identify a substantive source of law that establishes a specific
21 fiduciary or other duty of the agency. That could be a statute or
22 treaty. Paul mentioned that, kind of paraphrased in his remarks.

23 But the proposed language in the policy statement's
24 very broad. It doesn't acknowledge any possibility that there could be
25 a specific duty on NRC in certain circumstances.

1 My understanding is that between 1787 and 1868, the
2 U.S. government entered into 371 different treaties with Tribes.
3 Some are still enforced. Others have been abrogated.

4 Has the staff examined each of these treaties to
5 determine whether any of them create substantive duties on NRC that
6 could affect our trust responsibilities to a Tribe?

7 MS. OLMSTEAD: If I recall correctly, we have done
8 looked at specific treaties and specific licensing actions, but we would
9 do that on a case-by-case basis.

10 COMMISSIONER BARAN: But we haven't looked at
11 all of them to see that, I mean, we're making a blanket statement that
12 there isn't anything out there on any of these treaties essentially. Do
13 we know that that's true?

14 MS. OLMSTEAD: Well, also with the TPS, we say all
15 applicable statutes and law, and that would cover the treaties. So we
16 had a broad language there to cover that.

17 COMMISSIONER BARAN: Right. But the general
18 principal that is being enunciated here is that our trust responsibility
19 goes only so far as treating Tribes the same as everyone else under
20 our statutes or regulations.

21 And what I'm saying is, there may be a treaty out
22 there that would create a greater duty than that for us.

23 Do we know that that duty does not exist, that that
24 treaty does not exist? Have we looked at that before we make a
25 broad statement that there isn't such a duty?

1 MS. OLMSTEAD: Can I -- yes, go ahead.

2 MS. DOANE: So I don't think, I think that's, I think,
3 and perhaps it isn't artful. Well, I'll say that. It isn't artful, because I
4 think it's being misinterpreted.

5 That was really a signal to point out that the language
6 in 10 CFR Part 2 that refers to all persons throughout it, applies in our
7 interactions in these formal proceedings.

8 So it's not meant to exclude case-by-case
9 consideration of other laws and treaties and statutes, certainly under
10 Section 106 of the National Historic Preservation Act, we have
11 consultation responsibilities. All of that's recognized also under Part
12 2.

13 But this really was just a signal. And while it sounds
14 like it was something that we came up with for the Tribal Policy
15 Statement, it isn't.

16 It comes out of well-established NRC case law, that,
17 where this was a struggle in the proceeding about whether the all
18 persons reference did apply, and how it applied.

19 So that was, I think, the impetus behind putting it in.
20 But it really was a signal. But I think, if I may --

21 COMMISSIONER BARAN: Yes.

22 MS. DOANE: -- so that we stop digging here, I think
23 that there could be a more artful way of saying this.

24 And I think Heather Westra had said, you know,
25 maybe you want to period and not refer to it at all. And Heather, the

1 Prairie Island Indian Community has participated in a number of
2 proceedings.

3 So I understand where that, where that's coming from
4 because it doesn't, this doesn't reflect every single activity. It really
5 was just a signal to the all persons in Part 2. It wasn't meant to cover
6 every single --

7 COMMISSIONER BARAN: Well, I appreciate that
8 context, and the NRC obviously has to follow statutory mandates.

9 But we have considerable discretion within those
10 constraints, and there are cases where agencies have exercised their
11 discretion to fulfil their trust responsibility by providing greater
12 protection for Tribal interests than would otherwise be provided by the
13 agency for the general public. And courts have upheld those stronger
14 protections. Did the staff consider the implications of that line of
15 cases?

16 MS. DOANE: It does, it does so in every single case.
17 But the agency, the staff is bound by the, our rules. And so to the
18 extent that we can, well, okay, two things I would say.

19 The first thing is, our adjudications, as you know, are
20 very formal. I'm going to use adjudications, but there are a lot of
21 formal proceedings. So our adjudications are very formal.

22 But the, but prior to that, all of the activities that the
23 staff has been talking about, all of those activities, which are often
24 going on at the same time, are not so formal.

25 So a lot of our responsibilities that you're talking about

1 under these treaties can be carried out before we ever get there.

2 When you get to an adjudication, it's usually a
3 question about whether you've carried out those responsibilities
4 correctly. It's the issues you're asking about.

5 But when those issues are brought forward, this is
6 where those procedures in Part 2 are always applied. It is
7 controversial. I understand that. We've had a lot of petitioners here
8 that have said that.

9 COMMISSIONER BARAN: But the language isn't
10 limited to Part 2, and we have a lot of regulations beyond Part 2. So,
11 well --

12 MS. DOANE: Well, let's say --

13 COMMISSIONER BARAN: Let me just, you know --

14 MS. DOANE: That's true.

15 COMMISSIONER BARAN: We can, since I'm,
16 because I'm running out of time or have run out of time a couple
17 minutes ago.

18 Based on what I've heard today and just kind of the
19 research I've done on this, I don't think this language belongs in a
20 high-level policy statement.

21 If it ever came up in litigation, the staff would have the
22 argument available to them. But I don't, I don't think it makes sense
23 to go further than other independent agencies in a way that minimizes
24 the trust responsibility.

25 My view is, and you know, we'll, the Commission will

1 vote on this, and we'll have that dialogue, I think if we delete this
2 statement, I think we're going to have a strong policy statement that
3 should help build solid relationships with Tribal governments. But
4 thank you for your feedback on this provision.

5 CHAIRMAN BURNS: Thank you, Commissioner.
6 Before we close, any other, I think Commission Svinicki might --

7 COMMISSIONER SVINICKI: I just want to say I
8 really appreciate that Commissioner Baran has explored this issue so
9 fully here today.

10 I think wherever the Commission ends up in its voting
11 process on the final policy statement, this was a very valuable
12 dialogue about the purpose and intent of the language, whether it
13 stays or goes or is modified in some form.

14 And I will just say, what I interpret from the, Marc's
15 answer, was that the staff was very sincere and maybe the balance
16 too, saying why put something that you know engenders a certain
17 sentiment in a policy statement, the staff was saying.

18 But if that is how the agency historically has litigated
19 such matters, either in court or before licensing boards, is it consistent
20 with our transparency to set an expectation that we're open to doing
21 otherwise?

22 And I think that that's the balance, and I do take, and
23 will think very carefully about and formed any view of how this
24 particular language should read.

25 I will take into account Commissioner Baran's really

1 good point that, you know, the whole purpose is to fortify these
2 relationships by publicly embracing a set of principles. Do we
3 undermine that?

4 I think the Commission is going to have to balance
5 those factors and navigate that very carefully.

6 But I don't like to set an expectation of something if it
7 has a falseness to it to say, oh, we just, and maybe I'm reflecting and
8 Commissioner Baran will have some sympathy with this.

9 When you got down to legislative conference
10 negotiations on statute or potential new statute, there was a notion, it's
11 like, well, if it's going to upset people, let's just get rid of that language.

12 And you know, your obligation was to say, well, but
13 there's some truth in this language. And so what we will do is then
14 we'll punt it all off to courts to decide and others.

15 So I know that often it's very alluring to say, if it's
16 difficult, let's just not speak to it at all.

17 So that'll be a factor in what I'm balancing, is we want,
18 in embracing these principals, one of them is relationships and
19 transparency.

20 So I think we'll have to figure out how best to be clear
21 on this point without creating another set of problems. Thank you,
22 Mr. Chairman.

23 CHAIRMAN BURNS: Okay. Thank you. I'll thank
24 you again. I want to express my appreciation to both panels.

25 I think we had a good discussion this morning on sort

1 of broad aspects of the potential policy, but also in terms of our
2 relationship with Tribal organizations and Tribal governments.

3 We have a specifically, before us, the policy, I think,
4 to take on, to borrow from Mister Arnold, I'm going to look at it from 10
5 different directions. And we've had some of that today, and some
6 very specific things as well as some very general things.

7 I do appreciate the discussion that my colleague,
8 Commissioner Baran, has engaged in this, on this one aspect, and
9 well, that certainly is one thing we'll take a look at, but I think the other
10 important thing is, I think for the Commission to, we'll keep a focus on
11 the policy statement in terms of getting it out there, is I think the
12 consensus across the panels was, this is a positive, a positive step,
13 but more importantly, the, our continued engagement, our, doing
14 some of this work of training, outreach, consultation, those are
15 important things.

16 But those are the important things where we're
17 actually, you know, sort of on the ground and meeting our obligations
18 and engaging where Tribal communities may have an interest, or may
19 have an interest or may have an interest into the programs.

20 So again, thanks for all for being here and for the
21 discussion. We stand adjourned.

22 (Whereupon, the above-entitled matter went off the
23 record at 11:54 a.m.)