

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, Inc.	)	Docket No. 40-8943
	)	
(License Renewal for the In Situ	)	ASLBP No. 08-867-OLA-BD01
Leach Facility, Crawford, Nebraska	)	September 3, 2008

OGLALA SIOUX TRIBE’S REPLY TO NRC STAFF’S RESPONSE IN OPPOSITION  
TO PETITIONER’S REQUEST FOR HEARING AND/OR TO  
INTERVENE OF THE OGLALA SIOUX TRIBE

Petitioner Oglala Sioux Tribe (“Tribe”) hereby submits its reply to the NRC’s response to its petition to intervene in the above-captioned proceedings. The Tribe has endeavored to avoid repeating the arguments set forth in its Petition, and will only respond to new issues raised by the NRC, or try to clarify anything that was unclear in its Petition.

**I. The Oglala Sioux Tribe has standing**

**a. Aboriginal Rights**

In its petition, the Tribe asserted its treaty rights and the NRC’s obligation to it, a federally recognized tribe. First, the Tribe has asserted, and continued to assert, the illegality of the 1877 Act. However, for the purposes of these proceedings, the 1877 Act’s purported extinguishment of Sioux title outside of reservation boundaries is not even relevant to the Tribe’s issue of standing. The recognition that the area in question in the Application is the aboriginal land of the Tribe is what is relevant. “Indeed, ‘aboriginal rights [exist] independently of grants by the sovereign.’” *Alabama-Coushatta Tribe v.*

*United States*, 1996 U.S. Claims LEXIS 128 (Fed. Cl. 1996), citing *Lipan Apache*, 180 Ct. Cl. at 494. This is the Tribe's aboriginal land, therefore, the cultural resources, artifacts, sites, etc., belong to the Tribe. By enacting NEPA (42 U.S.C. § 4330 *et seq.*), NAGPRA, (25 U.S.C. 3001 *et seq.*), NHPA (16 U.S.C.S. § 470 *et seq.*) and other statutes, the United States Government has assured that the cultural resources of a tribe will be protected, even when they are not within reservation boundaries. Since there are cultural resources identified in the petition, and there may well be more that only the Tribe can identify and ensure that they are properly protected, the Tribe has a protected interest here. Any harm done to these artifacts, perhaps because the Applicant did not properly judge the significance of certain artifacts or other resources, will be an injury to the Tribe, caused by the actions of the Applicant, and condoned by the NRC, the Tribe's trustee.

The mere fact that the Applicant is building, excavating, etc. within the aboriginal land of the Tribe gives standing to the Tribe. The Tribe, as users and occupiers of the land, has left artifacts and other cultural resources in that very area. Beyond the simple trust obligation owed to the Tribe from the federal government, many statutes mandating protection for tribes' cultural resources, artifacts and remains have been enacted. The Applicant cannot continue to mine at Crow Butte without this federal permit. This permit is *major federal action* that triggers the applicability of those statutes, including NAGPRA, NEPA, and NHPA. Since this is the Tribe's aboriginal territory, the Tribe has a federally-protected interest in preserving those preserving those resources. The Tribe must intervene and participate in these proceedings to protect these rights. The Tribe and its own representatives, including its Tribal Historic Preservation Officers, are the only qualified ones to judge the cultural resources in the area.

## **b. Use of Water**

The Tribe does not rely on geographical proximity alone to assert standing. The expert opinions offered by the Tribe and other petitioners demonstrate that there are serious questions regarding the ground water communication in this area. As the sovereign government of the Oglala Sioux people, the Tribe, like any other government, is responsible for providing clean and safe water for its people. The Tribe has demonstrated in its petition further that that not only is potable water for its residents needed, but also sufficient water for farming and other agricultural pursuits. The activities by the Applicant threaten the safety of that water.

Further, the purported extinguishment of any right to occupancy outside the Pine Ridge Indian Reservation does *not* extinguish the other rights that attached to the creation of the reservation, such as *Winters* water rights. *Winters* established a new rule of water rights for Indians. The Court recognized that the creation of the reservations carried with it water rights sufficient to meet the needs of the Indians in carrying out the purposes for which the Reservation was created. “The Indians had command of the lands and the waters -- command of all their beneficial use, whether kept for hunting, and 'grazing roving herds of stock' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?” *Winters v. United States*, 207 U.S. 564, 577 (1908).

The 1877 Act did not disestablish the Reservation, and in fact, it reiterated the federal government’s intent to promote an agricultural lifestyle for the Oglala people, e.g. Article 5 of the 1877 Act provided that the Government would purchase surplus agricultural

goods produced by the Indians. Therefore, the Applicant's over-use of water, and contamination of such water, causes an injury to the Tribe, which has a superior water right.

### **c. Organizational Standing**

To claim that the Tribe needs to comply with the legal requirements for "organizational standing" or "representational standing" is an insult to the Tribe. Such an assertion places the Tribe on the level of the Sierra Club, instead of recognizing it as a sovereign nation whose duty, and *raison d'être*, is to protect its people. The Oglala Sioux Tribe is a *sovereign nation*, on par with any state.

The Tribe is the freely and democratically-elected government of the Oglala Sioux people, with a governing body duly recognized by the Secretary of Interior. The very election of the governing body of the Tribe by its members is all it needs to show that it is authorized to act on its citizens' behalf.

The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" ("Oglala Sioux Tribe" or "Tribe") under section 16 of the Indian Reorganization Act ("IRA") of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. The IRA is a "statute specifically intended to encourage Indian tribes to revitalize their self-government." *Fisher v. District Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 387 (1976). Article 8 of the Black Hills Act secures to the Tribe the right to an orderly government.

Under the IRA, the Tribe enacted a constitution "in order to establish a more perfect organization, promote the general welfare, conserve and develop our lands and

resources, secure to ourselves and our posterity the power to exercise certain rights of home rule not inconsistent with Federal laws and our treaties.” Preamble to the Tribe’s Constitution. Included among the tribal council’s powers is the authority “[t]o employ legal counsel for the protection and advancement of the rights of the Oglala Sioux Tribe and its members.” Art. IV, Sec. 1. Action taken pursuant to the IRA “implements an overriding federal policy.” *Fisher*, 424 U.S. at 390. The Tribe is the duly recognized body to promote and protect its citizens’ interests. In fact, it has been argued by others throughout the related Crow Butte proceedings, the Tribe is the only party who can assert the treaty rights.

## **II. NRC Staff’s response to Petitioner’s Reliance on 10 C.F.R. 40.9**

The NRC Staff assertion that 10 C.F.R. 40.9 is not a requirement that determines whether or not the Applicant’s license should be renewed, is unsubstantiated. The NRC Staff asserts that a completeness of application is not a matter that the Board should and ought to consider in this proceeding. The NRC Staff cites Nuclear Management Co. LLC, 62 NRC 735m743 (2005) in support of its assertion, this case does not address the scope and meaning of the statute in question. In *Nuclear Management*, the Petitioners’ contention is that the company seeking permit submitted an application that was incomplete and asked the Board to withdraw its application. *Id* at 742. Nowhere in the case does the opinion reference the statute in question, or speak to the scope of how this statute should be interpreted in regards to granting a license permit. In this case, the petitioners raise the issue of completeness not as a matter of seeking a remedy as in the *Nuclear Management* case, but rather as a deficiency in its application that needs to be

addressed because of the possible impact on the health and safety of the Oglala Sioux Tribe.

In the Board's ruling that allowed the Petitioners' contentions, dated April 28, 2008, it implies that incomplete information is relevant to this proceeding: "In addition, we note Petitioners' point out of places in the Application that indicate a lack of complete information, which is of course bolstered by Exhibit B." <sup>1</sup> As a practical matter, completeness and accuracy of the Application for renewal go to the very heart of what the Board should determine in considering the Application for license renewal.

Respectfully submitted this 3<sup>rd</sup> day of September, 2008.

/s/ Elizabeth Maria Lorina  
/s/ Mario Gonzalez  
Attorneys for Oglala Sioux Tribe  
522 7<sup>th</sup> Street, Ste. 202  
Rapid City, SD 57701  
605-716-6355 x102  
elorina@gnzlawfirm.com  
gnzlaw@aol.com

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<sup>1</sup> Memorandum and Order Atomic Safety and Licensing Board Panel, April 29, 2008. In the Matter of Crow Butte Resources, Inc. (License amendment of the North Trend Expansion Project).

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing REPLY have been served upon the following persons by Electronic Information Exchange.

Michael M. Gibson, Chairman  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [mmg3@nrc.gov](mailto:mmg3@nrc.gov)

Brian K. Hajek  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [hajek.1@osu.edu](mailto:hajek.1@osu.edu)

Office of Commission  
Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
Email: [OCAAMAIL.Resource@nrc.gov](mailto:OCAAMAIL.Resource@nrc.gov)

Tyson R. Smith  
Winston & Strawn LPP  
1700 K Street, N.W.  
Washington, D.C. 20006  
E-mail: [trsmith@winston.com](mailto:trsmith@winston.com)

Dr. Richard Cole  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [rfc1@nrc.gov](mailto:rfc1@nrc.gov)

Alan S. Rosenthal  
Administrative Judge  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [rsnthl@comcast.net](mailto:rsnthl@comcast.net);  
[axr@nrc.gov](mailto:axr@nrc.gov)

Office of the Secretary  
Attn: Rulemaking and Adjudications Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 G4  
Washington, D.C. 20555  
E-mail: [Hearing.Docket@nrc.gov](mailto:Hearing.Docket@nrc.gov)

Mark D. McGuire  
Counsel for Crow Butte Resources, Inc.  
McGuire and Norby  
605 South 14th Street, Suite 100  
Lincoln, Nebraska 68508  
Email: [mdmsjn@alltel.net](mailto:mdmsjn@alltel.net)

Western Nebraska Resources Council  
Chief Joseph American Horse, Thomas K  
Cook, and Francis E. Anders  
Shane C. Robinson  
2814 E. Olive St.  
Seattle, WA 98122  
Email: [shanecrobinson@gmail.com](mailto:shanecrobinson@gmail.com)

Western Nebraska Resources Council  
Chief Joseph American Horse, Thomas K  
Cook, and Francis E. Anders  
David Cory Frankel  
P.O. Box 3014  
Pine Ridge, South Dakota 57770



Email: [arm.legal@gmail.com](mailto:arm.legal@gmail.com)

Owe Oku, Debra White Plume and  
David House  
P.O. Box 2508  
Rapid City, South Dakota 57709

Bruce Ellison  
Email: [belli4law@aol.com](mailto:belli4law@aol.com)

Oglala Sioux Tribe  
Elizabeth Lorina  
Mario Gonzalez  
522 7th Street, Suite 202  
Rapid City, South Dakota 57701  
Email: [elorina@gnzlawfirm.com](mailto:elorina@gnzlawfirm.com);  
[gnzlaw@aol.com](mailto:gnzlaw@aol.com)

The Oglala Delegation of the Great Sioux  
Nation Treaty Council  
Thomas J. Ballanco  
Harmonic Engineering, Inc.  
945 Taraval Ave. #186  
San Francisco, California 94116  
Email: [HarmonicEngineering1@mac.com](mailto:HarmonicEngineering1@mac.com)

Thomas K. Cook  
1705 So. Maple Street  
Chadron, Nebraska 69337  
Email: [smbttsag@bbc.net](mailto:smbttsag@bbc.net)

Brett Michael Patrick Klukan  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
(301) 415-3629  
[Brett.Klukan@nrc.gov](mailto:Brett.Klukan@nrc.gov)

Andrea Z. Jones  
Catherine Marco  
Office of the General Counsel  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001

(301) 415-3629  
[ax4@nrc.gov](mailto:ax4@nrc.gov); [clm@nrc.gov](mailto:clm@nrc.gov)