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
	)	
	)	ASLBP No. 08-867-OLA-BD01
(License Renewal for the In Situ	)	
Leach Facility, Crawford, Nebraska	)	September 3, 2008

OGLALA SIOUX TRIBE'S REPLY TO APPLICANT'S RESPONSE TO PETITION TO INTERVENE FILED BY OGLALA SIOUX TRIBE

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

I. The Oglala Sioux Tribe Has Standing in this Action

a. Aboriginal territory.

The Tribe has made it clear that the mine is located within its aboriginal territory. It simply cannot be disputed that this area at issue is the Tribe's aboriginal territory, which means, by definition, that the federal government has recognized that the Tribe has had immemorial possession of the area. BLACK'S LAW DICTIONARY (7th ed.). The Tribe's use and occupation of the land, and accordingly, rights and interests in the area are recognized by treaty, which is the "supreme law of the land."

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 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.*). 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.

c. Federal action at issue

It is patently erroneous for the Applicant to state that “The NRC is not equipped, or authorized, to assess the Federal Government’s compliance with its obligations under the Fort Laramie Treaties”. (Applicant’s Response, p. 13) The NRC *is* the federal government, and thus must comply with all duties and obligations of the federal government. The Tribe begs the indulgence of the Board to repeat its earlier argument regarding the NRC, a federal agency, and its obligation to the Tribe.

> As a federally recognized tribe, the Oglala Sioux Tribe has a trust relationship with the United States government, including all its agencies. *See e.g. Pueblo of Santa Ana v. United States,* 1997 U.S. Claims LEXIS 329 (Fed. Cl. Dec. 2, 1997) (“The federal government’s fiduciary duty to Indian tribes applies to all federal agencies and programs.”) *Parravano v. Babitt,* 70 F.3d 539 (9th Cir. 1995) (“This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole.”); *Nance v. EPA,* (“It is fairly clear that any Federal government action is subject to the United States’ fiduciary responsibilities toward the Indian Tribes.”).

When considering whether to grant or deny an application for ISL mining, the NRC must ensure that its decision complies with *all* federal law. The NRC cannot make its decision in a vacuum or in isolation. The Applicant may not have specific obligations *to* the Tribe, but the Applicant is requesting action that can *only* be granted by a federal agency, which is certainly bound by treaties and other obligations owed to federally recognized Indian tribes.

Furthermore, as a federally recognized tribe, the Tribe’s right to fully participate in these proceedings is already recognized by 10 C.F.R. 315(c).

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. Contentions are within the scope of the license renewal proceeding.

In its response, Applicant generally states that the contentions raised by the Tribe are not within the scope of the license renewal proceeding, because they are based on historical or operational matters, not relevant to the license renewal period. The Atomic Safety and Licensing Board Panel issued a memorandum and order dated April 29, 2008 regarding contentions allowed for an amendment of Applicant's license. In that ruling, the Board recognized the importance of considering historical information in the amendment to Applicant's license: "The information regarding prior leaks and spills is relevant because the application itself relies on Applicant's prior mining operations as an indication of how it would conduct its proposed new operation. It would be manifestly unfair not to permit the Petitioners also to use such historical information." (Board Decision pg 96). Petitioners argue that a license renewal proceeding is similar to a new application, and a license amendment, in regards to safety and health issues. The NRC would not require less accurate information on health and safety of those affected by mining activities, for a license renewal than for an amendment to a license, or a new license application.

Additionally, Applicant responds to the Tribe's contentions, stating that safety issues are only relevant to license renewal if they are: "significantly different from, and defined more narrowly then, those relevant during original licensing proceeding. (Applicant's response pg 14). Applicant's positions are in direct contradiction from the

Board decision cited above regarding contentions raised in the license amendment proceeding. In that decision, the Board stated that past spills and leaks are relevant because it indicates how Applicant might conduct itself in the future. Additionally, since Applicant's originally application for license, new scientific data has been published that the NRC should evaluate and consider, in order to evaluate whether Applicant accurately describes in its application the health impacts of ISL mining. These scientific articles are the result of government funded research published in 2005, and 2007(included with the original petition, to which Applicant is responding). Applicant contends that the Tribe did not provide documents to which are cited in its document filed in this case. The Tribe apologizes for any omission of documents, and herewith attach to this response all documents referred to in its Request to Intervene.

III. Concerns about Contention 2 are without merit

First, the Applicant claims that "the petition fails to take issue with any specific portion of the application". (Applicant's Response, p. 20). In case it was not clear in the petition, the Tribe directs the Applicant to page 15 of the Petition, which identifies, in a bold heading, "Specific examples from the Application", which enumerates the specific statements in the application that the Tribe believes is erroneous. The Tribe has never been consulted on these identified properties to properly judge if they are being properly preserved. But more importantly, the Tribe has never evaluated the site itself to judge if any important sites or resources were not included. Since the Tribe is the *only* entity qualified to make this assessment, and the Tribe has never assessed the area, the Application is incomplete and inaccurate.

Respectfully submitted this 3rd day of September, 2008.

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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.

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