December 22, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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	)	

OGLALA SIOUX TRIBE'S REPLY TO THE APPLICANT'S APPEAL OF LBP-08-24

1. INTRODUCTION

Pursuant to 10 C.F.R. 2.311(a), the Oglala Sioux Tribe ("Tribe") hereby responds to the "Crow Butte Resources' Brief in Support of Appeal from LBP-08-24". The Applicant seeks to reverse the Atomic Safety and Licensing Board ("Board") decision on standing of the Oglala Sioux Tribe and the admission of its five environmental contentions. The Tribe urges that the Licensing Board's Order with respect to the Tribe's Standing and Admitted Contentions be upheld in its entirety.

2. ARGUMENT

I. The Oglala Sioux Tribe has standing

A. Organizational Standing is Inapplicable to Federally Recognized Tribes

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 does not need to comply with the standing requirements articulated in *Hydro Resources, Inc.*, as cited by the NRC Staff. 47 NRC 261, 271 (1998). The important distinction here is that the petitioners in that case were *organizations* or individuals. *None* of the petitioners were federally recognized Indian tribes and the case simply is not analogous or remotely relevant to this issue.

The Oglala Sioux 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. Indeed, 28 U.S.C. 1362 provides that

> [t]he district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

While this of course an agency action at present, the principle is the same- federally recognized Indian tribes have the authority to bring claims for actions arising under the Constitution, laws or treaties of the United States.

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.

B. The Board Correctly Determined that the Tribe had Standing to Intervene in these Proceedings.

The Board correctly determined that the Tribe successfully demonstrated complied with the standing requirements in a licensing proceeding. The Applicant's mining activity directly injures the Tribe. Not only do the mining and associated activities have the potential to destroy invaluable cultural resources that belong to the Tribe, but the mining itself is a threat to the health and safety of the Tribe itself. The Tribe has submitted an expert opinion that show that the aquifer used by the Applicant is not hydrogically isolated, and has the potential to contaminated water used by the Tribe. Furthermore, the Tribe's petition relied in part on studies published in peer-reviewed journals that refute the Applicant's statements that the mining operations can have no effect on human health,

including a NIH-funded study that found a direct correlation between exposure to depleted uranium and mutations in cells.[1] Pine Ridge Indian Reservation has a cancer rate 40% higher than the national average. The Tribe has serious concerns about the information proferred by the Applicant with regard to the effect of ISL mining on human health, which is supported by the expert testimony of Dr. LaGarry and Richard Abitz, as well as the published studies which are not even considered by the Applicant.

In 10 C.F.R 40.32(c)(d) General Requirements for Specific License, it states: (c) The applicant's proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; and (d) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public. The Tribe, bolstered by their experts and literature review, believe that the actions of Crow Butte, as detailed in their own Application, are a threat to the health and safety of the Tribe.

C. The Board Properly Admitted the Tribe's Environmental Contentions A-E.

The Board correctly determined that all of the Tribe's proposed contentions met the admissibility requirements of 10 C.F.R. § 2.309(f)(1).

1. *Environmental Contention A was correctly admitted.*

The Tribe took specific issue with the silence of the Application with regard to the effect of ISL mining on human health. Dr. LaGarry's opinion did not merely provide an "overview of the geology", but rather showed how the mining activities in Crow Butte could affect the surrounding area through the connected hydrology. The NIH-funded

[1] Uranyl acetate induces hprt mutations and uranium-DNA adduct in Chinese hamster ovary EM9 cells. Diane M. Stearns et. al. Mutagenesis vol. 20 no. 6 pp. 417 – 423, 2005.

study cited by the Tribe explain why it disagrees with the Applicant's assertion that there are no non-radiologcial health impacts on humans. The basis of the study was the interest in environmental exposure risks to uranium in drinking water. Until the findings of the Stearns' study were published, it was thought that only radiation exposure from uranium caused the risk for cancers and other health problems. Stearns found that both the radioactivity of uranium, and the non radiological active form of uranium caused cell mutations. Dr. Stearns concluded: "This possibility of direct U-DNA interaction should be considered when extrapolating potential risks for people exposed to uranium in the absence of measurable radioactivity, for example in soil and drinking water, and in DU – containing shrapnel."[2] This has never been considered by the Applicant according to its Application, and the risk of uranium exposure to the residents of Pine Ridge Indian Reservation is a strong possibility according to the latest research.

The Tribe takes specific issue with the plan detailed in the Application to *not* test for uranium in the monitor well testing, and offers the expert testimony to show that it should be tested for in the monitor well testing. Furthermore, while the Applicant certainly thinks its reason for excluding uranium from the monitor well testing, as detailed in its Application are sound, the Tribe provided an expert opinion of Richard Abitz that there is no valid scientific reason to exclude it from the list of excursion monitoring parameters." Dr. Abitz states further: "Uranium is a key indicator of lixiviant excursion because its concentration in baseline wells is generally two or three orders of magnitude lower than the lixiviant…there is no rational basis to exclude the best excursion indicator…".

[2] Id. At 421.

Dr. LaGarry's opinion need not be quoted in its entirety here, but the focus of Dr. LaGarry's opinion is his concern that "unmapped and unmonitored faults may be transmitting lixiviant and waste water through confining layers and into the White River, the alluvium within the White River Valley, and into the secondary porosity of the Brule Formation.", and the problems that may result if the mining aquifer is *not* isolated, as asserted by the Applicant. LaGarry, p. 1. Dr. LaGarry identifies in his opinion "two principal pathways through which contaminated water could migrate away from Crow Butte Resources well fields and into adjacent areas", which is precisely what concerns the Tribe about the Applicant's mining operations and the effect they may have on Pine Ridge. LaGarry, p. 3.

2. The Tribe's Environmental Contention B Was Properly Admitted

While the Tribe has asserted, and continued to assert, that the federal government's obligations under NHPA must be complied with, the NRC oversimplifies the Tribe's argument. At the heart of the Tribe's Environmental Contention B is the Tribe's contention that Crow Butte's ("Applicant") Application with regard to its representations about cultural resources is incomplete and inaccurate. The Applicant made various representations about the indigenous cultural resources found in the Application area, but since the Tribe has never verified any of this information. These potential artifacts and evidence are from *Oglala* and *Lakota* history, and no body or entity is more qualified to judge their existence or importance that the Oglala Lakota Oyate (people) themselves- which is precisely why consultation is required and those determinations are not left to the federal agency or company proposing action. The Application itself states that it will work with the *Nebraska State Historical Society* to avoid the identified cultural resources,

including Native American ones, and ignores the Tribe's unique expertise. The Application also states at Section 4.8 that the Nebraska SHPO has determined that the identified sites or artifacts are not eligible for inclusion on the National Register, but the Tribe has not been consulted with regarding any sites or potential sites. The Tribe's protestations that they have not been consulted regarding a determination of those resources is not limited to its rights under NHPA and other federal statutes. Rather, the Tribe's issue with the Application is that it purports to describe the significant cultural resources in the area, with a plan to avoid them, but the Tribe disputes the Applicant's determination (as represented in their Application) of what is significant and what should be protected from the Applicant's activities. The Tribe further takes serious issue with the experts utilized by the Applicant to prepare its Application.

The Tribe's rights are threatened by the Applicant's mining activity in its aboriginal territory. The Applicant's mining area is in what is known as the 1851 Treaty Territory of the Oglala Sioux Tribe, and it is the aboriginal land of the Tribe. While subsequent treaties and Congressional acts have modified or extinguished certain provisions in the 1851 Treaty of Fort Laramie, the 1851 Treaty still establishes the area in question as the aboriginal territory of the Tribe. "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. While only the federal government can actually *consult* with the Tribe, the Tribe maintains that the Application's determination of cultural resources in the area is deficient, and therefore the Tribe submitted Environmental Contention B, which was properly admitted.

3. The Tribe's Environmental Contention C Was Properly Admitted

The Tribe took issue with the Applicant's statement in its Application that the impact of surface waters from an accident is "..minimal since there are no nearby surface water features." LRA 7.4.2.2. While the Applicant states in its appeal that it has taken affirmative steps to protect surface water quality in the event of a wellfield accident, it is the *Application* which states that no surface water would be affected in the event of an accident because there are no nearby surface water features. LRA at 7-9. However, other parts of the Application do identify nearby surface waters.

The threat to Pine Ridge from a spill onto the White River, as explained by experts, detail the factual disagreements with the Application with respect to a potential threat from a spill on the White River. As noted in the Board's decision, three expert reports (from Paul Ivancie, W. Austin Crewell, and Dr. LaGarry) all agree that the White River alluvium (as a potential pathway for contamination) should be evaluated for possible contamination from the Crow Butte mining site.

4. The Tribe's Environmental Contention D Was Properly Admitted.

The recurring proposition that the hydrology at Crow Butte is isolated underlies the basis for the entirety of the scientific theory used to support the Application. However, Dr. LaGarry's opinion disputes several allegations in the Application, and is not merely an overview of the regional geology.

5. The Tribe's Environmental Contention E Was Properly Admitted.

The Tribe disputes part 7.11 of the Applicant's Application which states that "[w]astes generated by the facility are contained and eventually removed to disposal elsewhere." The Tribe took issue with this part of the Application since the Applicant has a documented history of not disposing of waste as required by its various permits, and as represented in its Application. It is irrelevant that the Nebraska Department of Environmental Quality determined in the consent decree that no contamination had occurred as a result of improper waste disposal. The improper waste disposal did occur, and indicates an imperfect safety record that calls into question the future operations of the mining operation.

CONCLUSION

For the forgoing reasons, the Tribe respectfully urges the Commission to uphold the decision of the Board with respect to the Tribe in its entirety.

Respectfully submitted,

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