

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

Oglala Sioux Tribe and Western	)	
Nebraska Resources Council, et al.,	)	
Petitioners,	)	
v.	)	No. 09-2262 and 09-2285
	)	(Consolidated)
U.S. Nuclear Regulatory Commission	)	
and the United States of America,	)	
Respondents.	)	
_____	)	

**UGLALA SIOUX TRIBE’S RESPONSE IN OPPOSITION TO THE  
FEDERAL RESPONDENTS’ MOTION TO DISMISS**

The Oglala Sioux Tribe (“Tribe”) hereby submits its opposition to the federal respondents’ (“Government”) motion to dismiss. In July 2008 the Tribe timely filed its petition to intervene in Crow Butte Resource’s (“Crow Butte”) application license renewal application. The Atomic Safety and Licensing Board (“Board”) issued its decision in November 2008, granting standing to the Tribe and admitting all five of its contentions. LBP-08-24, \_\_\_ NRC \_\_\_ (Nov. 21, 2008). The Nuclear Regulatory Commission Staff (“Staff”) and Crow Butte both appealed the Board’s order on December 10, 2008. The Commission issued its Memorandum and Order on May 18, 2009. The Commission upheld the Board’s order with respect to the Tribe’s standing and the admission of its Contentions A, C, and D. The Commission overruled the Board’s Admission of the Tribe’s Contentions B and E. The Tribe filed its notice of appeal to this Court.

## ARGUMENT

The regulations governing those administrative proceedings provide that affected parties may intervene in licensing proceedings. 10 C.F.R.2.309(a) provides that affected parties may petition to intervene and put forth specific contentions they wish to have litigated in the hearing. The Commission's decision to deny the admission of the Tribe's Environmental Contentions B&E is final, and to prevent the Tribe from appealing that decision would severely prejudice its congressionall mandated rights and is a waste of judicial resources.

This Court has held that "the requirement of finality is to be given a 'practical rather than a technical construction.' . . . The most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Barnes v. Bosley*, 790 F.2d 718, 719 (8th Cir.1986), quoting, *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). Allowing the Tribe's remaining three contentions to be advanced in the administrative proceedings, while only providing the judicial review *after* the related proceedings are finished, is a waste of judicial resources.

The cultural resources of the Tribe are one of its most precious and valued resources. Allowing the mine to continue to operate during the hearing procedures and then possibly during an appeal to this Court again would prejudice their rights irreparably. The Board held, when admitting the Tribe's contention B, that

However laudable the NRC Staff's assurance to the Board that it will involve the Tribe in its NEPA review of cultural resources at the Crow Butte mining site, such assurances are no substitute for enabling the Tribe to prosecute its contention here. In fact, the NRC Staff notes that "the NRC has not yet even begun the required section 106 evaluation process." The Board must afford the Tribe a way to ensure its interests are protected; if we were to deny all claims because an adverse party promises to fulfill its duties, we would subvert the hearing process.

LBP-08-24, \_\_\_ NRC \_\_\_ (p.31 of Slip Op). The Board correctly held that the rights of the Tribe would be prejudiced if it were not allowed to advance its interest in the cultural objects at every stage of these proceedings. Forcing the Tribe to defer this contention may cause irreparable harm. "Procrustes could not have devised a more odious method of frustrating petitioners than NRC proposes here." *Id.* at 32.

The Board supported its reasoning with the historical record of the NRC and Crow Butte. When Crow Butte applied for a license renewal in 1995, it identified eight possible sites with connection to the Tribe, but the Tribe was never consulted by the Staff on the significance of those sites, or completeness of that inventory. Upon order of the Board, the Staff submitted a response in the proceedings that it had no record of the staff making contact with any Indian Tribe regarding the sites.<sup>1</sup> This is violation of the statutory mandates of NHPA. 36 C.F.R. § 800 *et. seq.*

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<sup>1</sup> "The Staff was unable to find any documentation reflecting a direct NRC contact with any Indian tribe." NRC Resp. to Board at 7.

The record clearly shows that the Tribe' *congressionally mandated* rights to be consulted with respect to its cultural resources have not been respected throughout the history of this mine. The Board noted that during the *thirteen* years the NRC had been aware of the cultural resources, the Tribe had never been consulted on them. *Id.* at 35. The Supreme Court has recognized that the trust duty owed to Indian Tribes, who are "dependent and sometimes exploited people", is the highest legal duty.

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust.

*Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). The Tribe's federally-protected rights to its own cultural resources have repeatedly been ignored and trampled on by its own trustee and the very entity mandated to protect them. Precluding the Tribe from litigating the issue of their cultural resources during the administrative hearing jeopardizes its rights. Allowing an appeal now is the only way to protect those rights.

*Dickinson*, as cited by the Government, is distinguishable. The government cites it for the proposition that "an order is final only if it 'imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation an

administrative process.” *Dickinson v. Zech*, 846 F.2d 369, 371 (6th Cir. 1988).

However, there the court reasoned that

[t]he denial of petitioner's request for emergency relief by the NRC in this case does not represent the end of that agency's analysis of the issues involved. Indeed, it is clear from the letter denying emergency relief that the NRC contemplates addressing petitioner's concerns more fully in a final decision pursuant to § 2.206.

*Id.* at 372. That will never happen here. The Commission has overruled the Board's decision allowing those contentions. The Tribe's contentions B and E will never be considered during the administrative proceedings. The Commission has completely foreclosed the possibility of the Tribe litigating its concerns with the accuracy of the Crow Butte's application with respect to cultural resources and disposal of waste water.

### **CONCLUSION**

For the foregoing reasons, the Court should deny the Federal Respondents' Motion to Dismiss.

Dated this 20<sup>th</sup> day of July, 2009.

Respectfully submitted,

/s/ Elizabeth Maria Lorina  
Elizabeth Maria Lorina  
Attorney for OST  
Lorina & Cesna, LLP  
2650 Jackson Boulevard  
Rapid City, SD 57702  
(605) 348-7770 (telephone)  
elorina@lorinacesna.com

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I hereby certify that on July 8, 2009, I electronically filed the foregoing "TRIBE'S RESPONSE TO FEDERAL RESPONDENTS' MOTION TO DISMISS" with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate ECF system.

Dated this 20<sup>th</sup> day of July, 2009.

Respectfully submitted,

/s/ Elizabeth Maria Lorina  
Elizabeth Maria Lorina  
Attorney for OST  
Lorina & Cesna, LLP  
2650 Jackson Boulevard  
Rapid City, SD 57702  
(605) 348-7770 (telephone)  
elorina@lorinacesna.com