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
MARSLAND EXPANSION	)	License SUA-1534
(In Situ Leach Facility, Crawford, NE)	)	

REPLY TO NRC STAFF AND APPLICANT RESPONSES TO THE PETITION TO INTERVENE AND REQUEST FOR HEARING OF THE OGLALA SIOUX TRIBE

1. Introduction

The Oglala Sioux Tribe (Tribe) hereby submits this Reply to the Responses of NRC Staff and Applicant Crow Butte Resources, Inc. (Crow Butte) in opposition to the Tribe's request for intervention in this matter.

In its Response, NRC Staff concedes standing for the Tribe based on an interest in protecting the significant cultural resources present at the site and threatened by the operation, but contends the Tribe lacks standing on any other basis. Despite its concession of standing for the Tribe, NRC Staff goes on to argue for the dismissal or deferral of each of the ten contentions set forth by the Tribe. Crow Butte argues that the Tribe lacks any meaningful interest in this case, even in the protection of its own cultural and historic resources at the site. Crow Butte also contends that the Tribe's Petition fails to state an admissible contention. As discussed in the Petition and herein, the Tribe has established standing in this case and each of the Tribe's contentions are properly stated and should be admitted.

The present Reply demonstrates that the joint effort of NRC Staff and Crow Butte fails to refute the Tribe's demonstration of standing. In its Petition for Intervention and Request for Hearing (Petition), the Tribe provided detailed declarations from senior Tribal government

officials demonstrating the significant legally protectable interests held by the Tribe in the lands, waters, and other resources, including significant cultural and historic resources, potentially threatened by this proposed project. Neither NRC Staff nor Crow Butte takes issue with the admissibility or veracity of these declarations. Instead, NRC Staff and Crow Butte ignore the pleading standards and argue that the Tribe should have provided information tantamount to that sufficient to support a ruling on the substantive merits.

Instead of engaging the facts and authority provided in the Petition, Crow Butte's Response mischaracterizes and misinterprets the Tribe's argument. Similarly, the NRC Staff's tactic of making a narrow concession of standing based solely on an interest associated with as of-yet unidentified cultural resources, while mounting an attack on all other interests of the Tribe, is contrary to legal precedent.

The Tribe's Petition sets forth the necessary standing allegations and forwards well-pled contentions. In its Petition, the Tribe raised six contentions, each set forth with specificity in accord with NRC regulations at 10 C.F.R. § 2.309(f)(1). To establish standing, the Tribe has pled concrete and cognizable interests, including substantial concerns about the impacts of the proposed in-situ leach uranium mining operation on the public health and environment. Each contention references the information (and omissions) in the existing application materials.

Throughout their objections to the Tribe's contentions, both NRC Staff and Crow Butte continually argue the merits of the proffered contentions, rather than keeping a proper focus on whether the contentions are admissible. Indeed, NRC Staff and Crow Butte engage in an extraordinary effort to flyspeck the Tribe's contentions, going far beyond simply reviewing for adequacy.

This Reply supports the Tribe's well-pled standing allegations and all six contentions based on the regulatory standards and the standards that apply to the pleadings stage. Based on the detail set forth in the Petition, and as further described herein, the Board must find that the Oglala Sioux Tribe has sufficiently pled facts necessary to support standing in this proceeding and that each of the Tribe's proffered contentions is admissible based on the requirements of 10 C.F.R. § 2.309(f)(1).

2. Argument

At the outset, the Oglala Sioux Tribe is compelled to express its continued disappointment in what appears to be an aggressively hostile stance taken in this proceeding by the NRC Staff to any participation whatever by the Tribe. One might expect the project proponent to fight all participation by the public or even by a sovereign Tribal government in a license proceeding. The same, however, should not be expected of federal agency employees.

In this case here, despite the fundamental and well-supported issues identified and raised in the Petition with respect to the failure of the application to meet regulatory requirements aimed at protecting public health and the environment, NRC Staff systematically attack each and every contention, often with substantive arguments not appropriate to the pleading stage of this adjudication. The Tribe's disappointment in the NRC Staff's over-zealous attempts to exclude the Tribe entirely from this proceeding is especially acute given the NRC's published policies recognizing the special government-to-government relationship between the federal government and Tribal governments, and stating an intention to promote and encourage meaningful tribal government involvement in NRC licensing proceedings as full parties with the ability to raise issues determined by the Tribe. See *U.S. Nuclear Regulatory Commission Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites*, U.S.

Nuclear Regulatory Commission (2009). The Tribe's involvement is especially important in this case, given the significant concrete interests articulated by the Tribe and the substantial questions as to whether Crow Butte's application materials demonstrate compliance with controlling law and regulations.

3. Standing

NRC Staff concedes standing for the Tribe based on injury to the Tribe's concrete interests in protecting its cultural resources at the mine site. NRC Staff at 11. However, NRC Staff makes a muted opposition to the Tribe's assertions of standing based on the Tribe's procedural interests under the National Historic Preservation Act and National Environmental Policy Act. NRC Staff at 11-12. However, NRC Staff does not challenge the specific allegations of fact made by the Tribe in declarations. Further, NRC Staff overstate and misapply the standard applicable to standing at the pleading stage of a federal proceeding.

Crow Butte launches an attack on every basis on which the Tribe pleads standing. However, Crow Butte provides little legal authority to support its attack and does not seriously dispute the legal authorities in the Petition. Instead, the company simply parses the declarations, repeatedly alleging that the Tribe's declarations of harm are not sufficiently particularized. Crow Butte at 8-9. In making these arguments, Crow Butte ignores the detailed statements in the Tribe's declarations, misapplies the relevant legal standard applicable at this stage in the proceeding, and repeatedly confuses arguments relevant to standing with those on the merits of the case.

Crow Butte wrongly asserts that the Tribe must also demonstrate that "the proposed MEA ISR project as reflected in its license application (including its technical and environmental reports and supplement) will "**cause**" contamination at the Pine Ridge Reservation. Crow Butte

at 8 (emphasis added). Crow Butte provides no authority to support its novel argument that the Tribe's standing allegations must demonstrate that the project will "cause" contamination of the Pine Ridge Reservation. Similarly, NRC Staff argue the Tribe must prove that Crow Butte's activities will threaten specific artifacts at the site. NRC Staff at 11-12.

Lastly, both NRC Staff and Crow Butte contend that the Tribe cannot establish standing at the pleading stage based on potential impacts to surface and ground water quality because it did not identify any specific lands owned by the Tribe, nor any indication of how close such lands are to the MEA. NRC Staff at 15.

Prior Boards have encountered, and specifically rejected these precise tactics by license applicants and NRC Staff in contesting standing:

> We note, first, that many of [the applicant's] arguments address various alleged facts as if they were already proven. However, factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time required for water to flow a certain distance, go to the merits of the case. We also note that a licensing board's review of a petition for standing is to "avoid 'the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits.'" We recognize that the distances from Crow Butte's mining site to many of the petitioners' residences are considerable; however, neither Crow Butte nor the NRC Staff advances arguments refuting the plausibility that potential groundwater contamination from the Crow Butte mining site may travel through pathways of faults and joints and affect private wells at greater distances from the Crow Butte mining site, including petitioners at the Pine Ridge Indian Reservation. Petitioners are not required to demonstrate their asserted injury with "certainty," nor to "provide extensive technical studies" in support of their standing argument. These determinations are reserved for adjudicating the ultimate merits of a contention. We decline to burden the petitioners, at this preliminary stage, with the need to conduct extensive technical studies that may be required to meet their burden at a hearing. A determination that "the injury is fairly traceable to the [challenged] action … [does] not depend[] on whether the cause of the injury flows directly from the challenged action, but *whether the chain of causation is plausible.*"

In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), 68 N.R.C. 691, 707-708 (2009)(citations omitted).

Here, contrary to NRC Staff's argument that the Tribe fails to allege a potential impact to these interests (NRC Staff at 10), the Declaration of Wilmer Mesteth does just that. Based on Mr. Mesteth's declaration, the Tribe has sufficiently alleged standing based on impacts to the Tribe's interests in protecting cultural resources at the proposed mine site.

With respect to the Tribe's allegations of procedural injury, NRC Staff and Crow Butte fail to acknowledge that the Commission has previously recognized standing for the Oglala Sioux Tribe based on an interest in the protection of cultural resources and on the Tribe's procedural interest under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA):

> Crow Butte and the Staff argue that the Board erred in basing standing on the Tribe's injury stemming from the Staff's asserted failure to consult in compliance with the NHPA. They argue that the Staff's duty to "consult" under the NHPA in this proceeding has not yet ripened (that is, the Staff has not reached the consultation stage yet), and the "injury" does not arise from a deficiency in the application. These arguments misinterpret the Board's ruling. The Board found that the Tribe has a current, concrete interest in protecting the artifacts on the site, not simply a procedural interest. The past failure of the Staff to consult illuminates the difficulties faced in protecting that interest. In addition, the Board pointed to federal case law holding that, where a party's procedural right has been violated, that party has standing to contest the procedural violation even where the underlying interest the procedural right seeks to protect does not face an "immediate" threat. We decline to disturb the Board's ruling on this point.

In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska), CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009) at 3-4.

Overall, Crow Butte, and to a lesser extent NRC Staff, misstate the proper test for establishing standing in this case, and in doing so attempt to improperly increase the burden on parties seeking intervention. Previous proceedings have held that Petitioners need not provide comprehensive scientific proof of the impacts from a proposed project. Rather, a much less burdensome showing is required:

> A petitioner must have a "real stake" in the outcome of the proceeding to establish injury in- fact for standing. *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), LBP–79–10, 9 NRC 439, 447–48, *aff'd*, ALAB–549, 9 NRC 644 (1979). While the petitioner's stake need not be a "substantial" one, it must be "actual," "direct," or "genuine." *Id.* at 448. A mere academic interest in the outcome of a proceeding or an interest in the litigation is insufficient to confer standing; the requester must allege some injury that will occur as a result of the action taken. *Puget Sound Power and Light Co.* (Skagit/Hanford Nuclear Power Project, Units 1 and 2), LBP–82–74, 16 NRC 981, 983 (1982), *citing Allied–General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB–328, 3 NRC 420, 422 (1976); *id.*, LBP–82–26, 15 NRC 742, 743 (1982). Similarly, an abstract, hypothetical injury is insufficient to establish standing to intervene. *Ohio Edison Co.* (Perry Nuclear Power Plant, Unit 1), LBP–91–38, 34 NRC 229, 252 (1991), *aff'd in part on other grounds*, CLI–92–11, 36 NRC 47 (1992).

In the Matter of Hydro Resources, Inc., 47 N.R.C. 261, 270 (1998) *compare Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)(At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim.")

In the present case, the Tribe goes well beyond alleging a mere "abstract, hypothetical injury" and has shown, through allegations and declarations, that the Tribe has a "real stake" in the proceeding. No contrary declarations or other admissible evidence were provided by NRC Staff or Crow Butte, only argument of counsel. By contrast, the uncontested Declaration of the Oglala Sioux Tribe's Tribal Historic Preservation Officer recounts the strong interests the Tribe has in the cultural resources at the proposed mine site and the potential for harms arising from the proposed mining operation. Declaration of Wilmer Mesteth.

Crow Butte and NRC Staff arguments also contravene established federal case law on standing. As acknowledged by NRC Staff, the Commission has long applied contemporaneous judicial concepts of standing to determine if a party has a sufficient interest to intervene as a matter of right. NRC Staff at 8 (citing *Calvert Cliffs 3 Nuclear Project, LLC & Unistar Nuclear*

Operating Servs., LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC ___ (Oct. 13, 2009)(slip op. at 2). As established by the U.S. Supreme Court, the burden of a Petitioner at this early stage in the proceeding is relaxed and specific facts are presumably contained in the general allegations. *Lujan*, 497 U.S. 871, 889 (1990).

Similarly, NRC Staff also contravenes established federal law regarding standing based on procedural injury. NRC Staff at 14. Crow Butte wholly ignores the Tribe's allegations of standing based on procedural interests. The federal courts routinely afford procedural rights such as those held by the Tribe under the NHPA and NEPA with special consideration in an analysis of standing:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement ["EIS"], even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 n.7; discussed and applied in *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 452 (10th Cir. 1996) and *State of Utah v. Babbitt*, 137 F.3d 1193, 1216 (10th Cir. 1998). The Supreme Court recently affirmed that standing is established based on a showing of possible relief for a procedural harm, particularly where territorial interests of a government are involved:

> When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.

Massachusetts v. EPA, 549 U.S. 497, 518 (U.S. 2007)(holding standing established by Massachusetts based on procedural allegations and its "stake in protecting its quasi-sovereign interests" *Id*. at 536).

Similarly, contrary to the arguments put forth by NRC Staff and Crow Butte, the Tribe is not required to prove each evidentiary fact pled at this early stage in the proceeding. All that is required is a credible assertion of a concrete interest that may be impacted from the proposed project. *Bennett v. Spear*, 520 U.S. 154, 158 (1997)(examining standing and explaining that pleadings and declarations are sufficient to meet jurisdictional burdens during the pleading stage) The Board should decline the invitation by NRC Staff and Crow Butte to elevate the test for standing into a full-blown evidentiary determination.

In this case, the Tribe has alleged a significant interest in the protection of both the cultural resources at the site and the surface and ground water quality on and off site, including on lands leased by the Tribe in the vicinity of the project area. *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000)(holding that an individual can establish injury in fact by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable if the area in question remains or becomes environmentally degraded) a*ccord Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (U.S. 2009)("[w]hile generalized harm to the forest or the environment will not alone support standing, **if that harm in fact affects the recreational or even the mere esthetic (sic) interests of the plaintiff, that will suffice**." (*citing Sierra Club v. Morton*, 405 U.S. 727, 734-736, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972))(emphasis supplied)("interest alleged to have been injured 'may reflect 'aesthetic, conservational, and recreational' as well as economic values.'")(*quoting Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (U.S. 1970)). A similar basis for standing is the allegation that the Tribe suffers "informational" injury due to the failure of the NRC Staff to prepare a NEPA analysis at the earliest stages of these proceedings. See *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Heartwood v. U.S. Forest*

Service, 230 F.3d 947, 952 n. 5 (7th Cir. 2000) (informational injury from failure to comply with NEPA constitutes "injury in fact.")

NRC Staff ignore Circuit Court rulings directly contrary to the NRC Staff arguments. In *Rockford League of Women Voters v. U.S. Nuclear Regulatory Commission*, 679 F.2d 1218 (7th Cir. 1982), the court found that plaintiffs had standing to challenge the NRC's failure to revoke a construction permit to build a nuclear reactor even though plaintiffs faced no immediate physical harm because the reactor could not operate until it received an operating license from the NRC itself. The plaintiffs alleged "that if the safety problems . . . are not solved before construction is completed they will never be solved – the Commission will be stampeded into granting a license regardless." 679 F.2d at 1221-22. The Seventh Circuit found "[t]his allegation . . . sufficient to confer standing . . .." *Id.* at 1222. In *Rockford,* it was the NRC itself that issued the initial construction permit and it was the NRC that retained authority to deny the subsequent operating license if plaintiffs' safety concerns were not addressed. Yet, the Court still found plaintiffs to have standing because of a "threat" of injury.

NRC Staff contest the Tribe's assertion of standing based on its procedural rights under the NHPA by attempting to distinguish the Commission's decision in Crow Butte. NRC Staff argues that here, they have already initiated the required Section 106 consultation and the Tribe has not alleged specifically how the Staff has violated its rights under the NHPA Regarding MEA. NRC Staff at 15. However, even under the NRC Staff's unreasonably narrow view, the NRC's failure to consult with the Oglala Sioux Tribe on another ISL uranium project in the region is relevant to the potential harm to the Tribe's interest with respect to the operation currently under review. This is particularly true given that both cases involve the same Tribe's demonstrated substantive interest in protecting cultural resources from direct and cumulative

impacts of proposed ISL mining and the Tribe's procedural and informational interest in proper environmental and cultural resource review with respect to the project.

As set forth in the Petition, the NHPA requires involvement by the Tribe at the earliest possible time. Petition at 16. The consultation with Nebraska without also consulting with the Tribe reiterates that the NHPA violations are currently ongoing and are consistent with the history of NRC Staff ignoring the sovereign and statutory rights of the Tribe. Even under the NRC Staff's unduly narrow statement of the standing standard, the Tribe has identified a concrete injury to its legally protected procedural rights under the NHPA to a process designed to identify and protect its cultural and historic resources at the site.

The argument advanced by Crow Butte asserting lack of standing ignores the Tribe's legitimate role as a party entitled to prosecute its own contentions in these proceedings, as recognized by the NRC's published strategy for outreach and communication with affected tribes in the specific context of ISL uranium mining. The official NRC position is to "promote government-to-government relations between itself and Federally-recognized Indian tribes that have a known interest in, or may be potentially affected by, NRC's regulation of uranium recovery facilities." *U.S. Nuclear Regulatory Commission Strategy for Outreach and Communication with Indian Tribes Potentially Affected by Uranium Recovery Sites* (2009)(ML092110101) Similarly, although not reflected in the current proceedings, in a report to the Commission, the NRC Staff reports that its relationship and communication with tribes is strong, emphasizing the actions NRC Staff currently takes to involve tribes in the NRC licensing proceedings:

> In an effort to **encourage tribal input and participation**, staff engages with tribes to provide information related to the Commission's mission and regulatory authority, **highlighting opportunities for tribal involvement and consultation during the regulatory process**. NRC staff also maintains regular channels of communication with

> relevant tribes and tribal organizations and provides interested tribes with general information upon request. Native American tribal officials often initiate interactions with staff based on tribal interest in particular NRC-regulated activities. **Tribal concerns often reflect issues associated with NRC licensing new or existing facilities located on or near reservation lands, or in the vicinity of places of historical or cultural tribal importance located off reservation lands.** Tribes' concerns also include NRC regulated activities for which the tribe has developed a policy statement or position.

U.S. Nuclear Regulatory Commission Interaction With Native American Tribes, Policy Paper Information SECY-09-0180 (December 11, 2009). This document specifically recognizes the importance of tribal interests in cultural resource protection.

Lastly, both NRC Staff and Crow Butte challenge the Tribe's allegations of standing based on impacts to lands it leases in the vicinity of the project site for domestic and agricultural purposes. NRC Staff at 15; Crow Butte at 8. NRC Staff asserts that the Tribe fails to identify any lands owned by the Tribe. However, the Tribe did so in its Petition, at 9-10, where it specifies lands that it leases in proximity to the proposed MEA. Should any of the Tribe's property, water resources, or ability to economic viability become impacted, the Tribe's lands, and the ability of the Tribe to lease these lands, would be similarly negatively impacted. See Declaration of Denise Mesteth at 1-2.

NRC Staff also contends that the Tribe has failed to allege a "plausible pathway by which operations at the MEA might harm the Tribe's interests." NRC Staff at 15-16. However, the Tribe asserts that it grants domestic and agricultural leases in proximity to the MEA near Crawford, Nebraska. See Declaration by Denise Mesteth at 1. These allegations provide the very "plausible pathway" which NRC Staff assert is lacking. Thus, it appears that the NRC Staff contends not that a "plausible pathway" be identified, but that proof be made of impact. However, as cited above, "factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time required for water to flow a certain

distance, go to the merits of the case." *In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, 68 N.R.C. 691, 707 (2009). As in *Crow Butte*, neither NRC Staff nor the applicant has contravened Ms. Mesteth's allegations of harm, and thus standing has been sufficiently alleged.

In summary, the Tribe's Petition and supporting declarations and affidavits contain allegations that establish standing on all theories, including the Tribe's substantive interest in protecting its cultural resources both known and unknown at the site, its procedural interests in compliance with the National Historic Preservation Act, and its interests in protecting the economic and conservational viability of the lands it leases in the area of the proposed mining operation. The Board should rule in favor of the Tribe on standing on all grounds.

4. Contentions

Throughout their objections to the Tribe's contentions, NRC Staff and Crow Butte continually confuse the issues by arguing the merits of the contentions, rather than whether they have been properly stated and supported. For example, both NRC Staff and Crow Butte argue against the admissibility of several of the Tribe's contentions by citing material in the application they believe would support issuance of a permit on the topics challenged by the Tribe. See NRC Staff at 19, 20, 22-23, 26-27, 29-30, 34; Crow Butte at 13, 15, 17-18. These arguments short circuit these proceedings by going straight to the merits and ignoring whether the Tribe's contention is properly supported in the first instance.

"In passing on the admissibility of a contention, however, 'it is not the function of a licensing board to reach the merits of [the] contention.'" *Sierra Club v. United States Nuclear Regulatory Com.*, 862 F.2d 222, 226 (9th Cir. 1988) *quoting* In *re Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant)*, 23 N.R.C. 525, 541 (App. Bd. 1986) *accord* 69 Fed. Reg

2182, 2190 (January 14, 2004)("The contention standard does not contemplate a determination of the merits of a proffered contention."). Instead, as the regulations are interpreted, the Board review of admissibility of a well-plead contention is similar to a federal Court's review of claims in a well-plead Complaint:

> The relevant inquiry is whether the contention adequately notifies the other parties of the issues to be litigated; whether it improperly invokes the hearing process by raising nonjusticiable issues, such as the propriety of statutory requirements or agency regulations; and whether it raises issues that are appropriate for litigation in the particular proceeding. See *In re Texas Utilities Elec. Co.*, 25 NRC at 930; *In re Philadelphia Elec. Co.* (Peach Bottom Atomic Power Station, Units 1 and 2), 8 AEC 13, 20-21 (App. Bd. 1974). The Sierra Club's zircaloy-fire contention satisfied these requirements. Accordingly, we conclude that the Appeal Board failed to follow its own standards when it rejected the contention as nonspecific. See *In re Philadelphia Elec. Co.*, 8 AEC at 20 ("Section 2.714 should not be read and construed as establishing secretive and complex technicalities. . ..").

Sierra Club v. United States Nuclear Regulatory Com., 862 F.2d 222, 228 (9th Cir. 1988).

The Commission has also recently expressly held that NRC Staff and applicant arguments going to the merits of a contention are not relevant to the inquiry into the admissibility of a contention. See *In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska),* CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009). In that case, the Commission upheld the admissibility of contentions where the arguments against admissibility focused on the merits of the case, rather than admissibility:

> Crow Butte's appeal claims that the Tribe failed to call into question the adequacy of Crow Butte's biweekly monitoring program because its "application and experience shows [that] an undetected excursion is unlikely." It claims that the wellfield is ringed by monitoring wells in both the mined and overlying aquifers that would detect any excursions. It defends its decision to monitor for chloride rather than uranium, because chloride is naturally found in low concentrations and will be detected quickly by monitoring wells should an excursion occur. Crow Butte's arguments go to the merits of whether its monitoring program is adequate. They do not show that there is no genuine dispute over this matter. The Tribe explained its position in reasonable detail and provided expert reports to support that position.

Id. at 9. Elsewhere in the same decision, the Commission repeatedly admonishes NRC Staff and the applicant for confusing the standard for admissibility with a ruling on the merits of a contention:

> Whether the Tribe has proved its claim is not the issue at the contention pleading stage. The Board simply has to find that each of the elements of contention admissibility is satisfied, and need not weigh the merits of the petitioner's arguments.

Id. at 12 (see also *id*. at 13).

Apart from confusing their arguments on the merits with the admissibility of the Tribe's contentions, NRC Staff and Crow Butte repeatedly assert that the issues raised in the Tribe's contentions related to the inadequacy of the application materials are not valid.

The Tribe recognizes that "the NRC staff's mere posing of questions does not suggest that the application [is] incomplete." *In the Matter of Duke Energy Corporation (Oconee Nuclear Station, Units 1, 2, and 3),* CLI-99-11, 49 N.R.C. 328, 336 (1999) citing *Baltimore Gas & Elec. Co. (Calvert Cliffs Nuclear PowerPlant, Units 1 and 2),* CLI-98-25, 48 NRC 325, 349 (1998), 48 NRC at 349. The Commission has explicitly recognized, however, that an NRC Staff RAI pertaining to issues raised in contentions demonstrates that the subject matter of the contentions is material to the proceeding. *In the Matter of Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and4),* CLI-09-16, Nuclear Reg. Rep. P 31596 (July 31, 2009) at 4. State regulatory documents providing technical review of a state application based on the same application information also form a legitimate basis for establishing the relevance and material nature of a contention. As recently held by the Commission:

> [the state regulatory review document] is roughly analogous, in some respects, to an RAI, but this does not exclude it from the Board's consideration. On one hand we have held — repeatedly — that a petitioner may not simply wait for the Staff to identify missing information and then ground a new contention on that request. But on the other, we have acknowledged that in some cases, a petitioner may base a new contention on an RAI if the RAI or its response raises new information. In addition, Petitioners here did not

> simply use Exhibit B to identify new "omissions," but used it to bolster their original challenges to Crow Butte's application. And, significantly, the Board found that Exhibit B does not merely ask for additional information, but points out specific statements that the NDEQ staff reviewer found to be unsupported, misleading, or wrong.

See *In the Matter of Crow Butte Resources, Inc. (License Renewal for In Situ Leach Facility, Crawford Nebraska),* CLI-09-09, Nuclear Reg. Rep. P 31589, 2009 WL 1393858 (N.R.C.) (May 18, 2009) at 8 (citations omitted).

Overall, NRC Staff and Crow Butte arguments would require contentions that contravene the mandate in the regulations that prospective petitioners provide only a "brief explanation" of the contention, and a "concise statement" of the facts supporting a contention. 10 C.F.R. § 2.309(f)(1). Despite this binding requirement to make only "brief" and "concise" statements in support of contentions, NRC Staff and Crow Butte repeatedly assert an unreasonable contention standard that conflicts with the regulations by requiring full and complete detail with lengthy expert discussion. The Tribe respectfully submits that it has taken a reasonable approach that conforms to the requirements and purposes of the NRC's contention-pleading regulations. The Board should reject the NRC Staff and Crow Butte arguments that rely on an unreasonably heightened standard for stating contentions and which repeatedly argue the merits of the contentions rather than the adequacy of the Tribe's presentation of the contention. Not only is the NRC Staff and Crow Butte approach contrary to the applicable standards, it demands an unreasonable commitment of government resources at this early stage of a licensing proceeding. In an effort to provide clarity, the Tribe will walk each contention through the objective standards set forth in the regulations and thereby demonstrate the admissibility of each contention. 10 C.F.R. § 2.309(f)(1).

Contention 1: Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources, and Failure to Involve or Consult the Oglala Sioux Tribe as Required by Federal Law

NRC Staff argues that Contention 1 should be dismissed because the "Tribe has not identified any other specific deficiency in CBR's discussion of cultural resources in Section 3.8.1 or 4.8 of the ER, or in the cultural resources reports submitted to the NRC." NRC Staff at 20. This is incorrect. As recognized by NRC Staff, among the basis for this contention is the Declaration of Wilmer Mesteth, the Oglala Sioux Tribe Tribal Historic Preservation Officer. In that Declaration, Mr. Mesteth specifically challenges the analysis and conclusions of Crow Butte's evaluation, at pg. 2-3. This specific allegation is reinforced at ¶ 13, Mr. Mesteth specifically takes issue with Crow Butte's conclusion that the impacts to cultural resources will be "none" while elsewhere in the application materials there is an explicit recognition that impacts will occur. With respect to each of these criticisms, Mr. Mesteth identifies specific portions of the application materials. Mr. Mesteth, at ¶ 15, also takes specific issue with Crow Butte's failure to involve any Tribal government officials or Oglala Sioux Tribal members in order to properly discern the significance of the numerous cultural resources present at the site. Lastly, Mr. Mesteth, at ¶ 16, specifically challenges Crow Butte's failure to include relevant information in its analysis "including the failure to conduct any inquiry into or an evaluation of the ethnographic information available for the site. This information includes consultation with members of the indigenous community, the elders who have been in the area, medicine people, oral historians, and others who are familiar with the area." Based on these highly specific issues, NRC Staff's unsupported assertion that the Tribe failed to "specifically challenge the analysis or conclusions in any portion of the [Level III Cultural] Evaluation" should be rejected.

Instead of confining itself to arguing over the admissibility of Contention 1, NRC Staff attempts to require the Tribe to provide definitive proof of its contention that the application contains an inadequate information and analysis of cultural resources. NRC Staff at 19. NRC Staff previews its full argument on the merits, citing those portions of the application materials that it thinks support Crow Butte's compliance with the law, thus conceding that Contention 1 raises a material issue. NRC Staff at 19-21. It bears repeating that arguments on the merits are not proper at the contention pleading stage. Whether or not the applicant can demonstrate compliance with the requirements of 10 C.F.R. §§ 51.45 and 51.60 are matters to be resolved at a hearing.

Crow Butte contend that the Tribe's Contention 1 is actually two contentions, one challenging the adequacy of Crow Butte's cultural resources information, and one challenging NRC Staff's compliance with NHPA and NEPA with respect to fulfilling the agency's Tribal consultation duties. As such, Crow Butte argue that the second contention: (1) is not ripe for administrative review (Crow Butte at 11), and (2) is not proper in this forum because it is the equivalent of a challenge to the agency's regulatory process, rather than a challenge to the application (Crow Butte at 11). Both of these arguments should be rejected by the Board. With respect to the ripeness of the challenge in Contention 1 to NRC Staff's compliance with the NHPA, this contention is ripe. As stated in the Petition at 15-16, the circumstances in this case warrant consideration of this claim as soon as practicable. Primary among these reasons is that the NHPA violation is currently ongoing. This is a result of the NHPA's mandate that federal agencies initiate and conduct tribal consultation as early as possible in consideration of an undertaking. As set forth in the Petition, to exclude the Tribe from the cultural resources evaluation required under the NHPA until NEPA is conducted violates the NHPA and hampers

the Tribe's ability to protect its cultural resources by relegating NHPA compliance to the latest stages of these proceedings where federal law requires that these issues be addressed as early as possible. See Petition at 15.

Regarding Crow Butte's argument that the Tribe's contention is really aimed at challenging the regulatory framework and NRC Staff's implementation of its duties under NEPA and the NHPA, such a distinction should not preclude review at this time. As stated, the harms occurring as a result of NRC Staff's failure to comply with NHPA are ongoing. Further, the Board and Commission neglect to address this regulatory compliance issue during this proceeding at their own peril, as federal courts routinely allow for "as-applied" challenges to regulatory regimes in the context of site-specific permit or license challenges. *Ayers v. Espy*, 873 F.Supp. 455, 463 (D. Colo. 1994).

Overall, the Tribe's Contention 1 meets the requirements for stating contentions found at 10 C.F.R. § 2.309(f)(1). The Contention is specific and provides a brief description of the basis in alleging failure to comply with specific NRC regulations (10 C.F.R. §§ 51.45 and 51.60), and the NHPA and its implementing regulations. The contention is within the scope of the proceeding, as Crow Butte is required to provide a supportable evaluation of cultural resources, and NRC Staff is required to comply with the NHPA and NEPA. The Tribe provides the supporting facts, through the Declaration of Mr. Mesteth and specific references to the relevant application materials. Lastly, the Tribe has shown a genuine dispute on an issue of material law and fact, as evidenced by the arguments put forth by NRC Staff and Crow Butte on the proper interpretation of the relevant legal authority as well as the competency of the cultural resources study in the application.

Contention 2: Failure to Include Adequate Hydrogeological Information to Demonstrate Ability to Contain Fluid Migration

In arguing for the dismissal of the Tribe's Contention 2, NRC Staff and the applicant engage in an exercise of parsing out each statement the Tribe references in the supporting the Dr. LaGarry Opinion, then repeatedly arguing that based on that isolated paragraph alone, "Dr. LaGarry" has failed to state an admissible contention. NRC Staff at 30; Crow Butte at 13. However, it is the Tribe that is the Petitioner, and it is the Petition as a whole that sets forth the Contention, using Dr. LaGarry's expert discussion as a basis. Thus, the Tribe asserts that the various portions of Dr. LaGarry's Opinion together support Contention 2, as specifically laid out in the Petition at 17-18.

NRC Staff argues that Contention 2 should not be admitted because "Dr. LaGarry does not specifically challenge Crow Butte's data or analyses ...." NRC Staff at 28. The Tribe's Petition, however, does set forth these allegations and arguments. Notably, NRC Staff ignores the Tribe's explicit assertions that "the application fails to present sufficient information in a scientifically-defensible manner to adequately characterize the site and off-site hydrogeology to ensure confinement of the extraction fluids. These deficiencies include unsubstantiated assumptions about the supposed isolation of the aquifers in the ore-bearing zones and failure to account for natural and man-made hydraulic conductivity through natural breccias pipe formations and the historic drilling of literally thousands of holes in the aquifers and ore-bearing zones in question which were not properly abandoned." Petition at 18. Thus, contrary to the assertions of NRC Staff, the Tribe does state with particularity that Crow Butte has failed to identify boreholes, and takes issue with specific aspects of Crow Butte's data and analysis.

In fighting the admissibility of Contention 2, NRC Staff inexplicably argues that the

Tribe fails to cite to specific portions of the application. NRC Staff at 30-31. NRC Staff repeatedly argues that the Contention should be dismissed because the Tribe did not cite to the portions of the application materials that the NRC Staff believes supports the company's studies. NRC Staff at 32. However, NRC Staff cite to no requirement that a Contention discuss and refer to each and every portion of an application that bears any relation to the issue being contested. Such a requirement makes no sense, given the regulatory requirement for petitioners in these proceedings to provide a "brief explanation" of the basis for the contention and a "concise statement" as to the alleged facts. See 10 C.F.R. § 2.309(f)(1). Adopting NRC Staff's argument in this regard would wholly undermine these requirements by encouraging petitioners to literally overwhelm the proceedings with unnecessary information. In any case, the NRC Staff's repeated references to portions of the application materials that it believes supports the applicant's compliance with the law bear on the merits of the contention, not its admissibility.

The NRC Staff's trend of arguing the merits of the contention rather than admissibility continues throughout the NRC Staff's response to Contention 2. NRC Staff attempts to escape this fact by arguing the merits, then turning each such argument into an allegation that "Dr. LaGarry" has not identified a genuine dispute. The Board should reject this practice of framing the argument on the merits as one asserting the lack of a genuine dispute.

In sum, the Tribe has set forth an admissible contention in Contention 2. The Contention is specific and provides a brief description of the basis in alleging failure to comply with specific NRC regulations (10 C.F.R. §§ 40.31(f), 51.45, 51.60, 10 C.F.R. Part 40, Appendix A, criteria 4(e) and 5(g)(2), as interpreted by NUREG-1569). The contention is within the scope of the

proceedings as Crow Butte is required to provide a supportable description of the geologic setting and demonstrate the ability to confine the extraction fluids. The Tribe provides the supporting facts, through Dr. LaGarry Opinion of the specific references to the proposed MEA. Lastly, the Tribe has shown a genuine dispute on an issue of material law and fact, as evidenced by the arguments put forth by NRC Staff and Crow Butte on the proper interpretation of the relevant legal authority as well as the competency of the geologic characterization and the attempted demonstration of the ability to confine the extraction fluids.

Contention3: Inadequate Analysis of Ground Water Quantity Impacts

NRC Staff's argument with respect to the admissibility of the Tribe's Contention 4 goes straight to the merits of the issue, rather than the admissibility. NRC Staff at 30. For instance, NRC Staff cites and refers to sections of the application materials that it believes support its position that the company's discussion of groundwater quantity impacts is not insufficient or contradictory. Id. Crow Butte takes the same tack – focusing its objection to the admissibility of Contention 4 entirely on the merits, asserting that the regulations do not impose an "adequacy" requirement and running through its analysis of the portions of the application that it believes supports its position that the application sufficiently discusses groundwater quantity impacts. Crow Butte at 15. As discussed herein, argument on the merits is inappropriate at this stage in the proceeding.

Further, NRC Staff contends that the Tribe has failed to identify portions of the application materials that it takes issue with. NRC Staff at 30-32. NRC Staff repeats its unsupported argument that a Petitioner must specifically reference to each portion of the application materials that the NRC Staff feels is relevant to the contention at issue. This is a misreading of the regulations, which only require that a petitioner "include references to specific

portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief." 10 C.F.R. § 2.309(f)(1)(iv). In this case, the Petition sets forth Contention 3 in compliance with the regulation.

Contention 4: Requiring the Tribe to Formulate Contentions before an EIS is Released Violates NEPA

NRC Staff and Crow Butte misconstrue Contention 4 as a facial attack on the NRC regulations. It is not. Instead, Contention 4 alleges that the present proceeding fails to conform with the statutory requirements of the National Environmental Policy Act, as interpreted and implemented by the NRC regulations at 40 C.F.R Part 51 **and** the regulations promulgated by the Council on Environmental Quality ("CEQ"). 40 C.F.R. 1500, *et seq.* Despite being characterized as mere procedural impediments by NRC Staff and Crow Butte, the NEPA process is the means by which Congress has chosen to ensure that "the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971)). It is the policy decision of Congress to require all federal agencies – including NRC – to place their data and conclusions before the public at the earliest stages of the decision-making process to ensure that NEPA's procedural requirements result in open, honest, interdisciplinary and public discussion "in the service of sound decision-making." *Id*. at 1143.

Contention 4 briefly explains the basis for the contention and provides a specific statement of a legal issue, alleging that the facts and circumstances of this particular proceeding fail to meet the dual statutory purposes of NEPA that apply to all federal agencies: informed

decision-making and public participation. See Petition at 19-21. Neither NRC staff nor Crow Butte attempt to address NEPA's statutory mandate, as recognized by the federal court cases which form the legal basis of Contention 4, rightly conceding that NRC is bound by the informed decision-making and public participation purposes of NEPA.

In sum, there is no dispute that because Contention 4 does not involve any substantive matter that requires any special expertise of the NRC Staff or the Board, Contention 4 raises a material dispute over whether the CEQ regulations provide binding legal requirements material to the procedures used in these proceedings, and whether compliance has been achieved. 10 C.F.R. § 2.309(f)(1)(i-vi).

Moreover, these NEPA duties are material where Congress has imposed mandatory duties that regulate the conduct of all federal agencies, including the Board and NRC Staff during these proceedings. *Calvert Cliffs' Coordinating Comm. v. Atomic Energy Commission*, 146 U.S. App. D.C. 33, 449 F.2d 1109, 1114-1115 (1971)(NEPA requires an agency to comply with the procedural directives "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible."). Nowhere does Crow Butte or NRC Staff even suggest that NRC Staff or this Board can lawfully discharge its duties without complying with the procedural aspects of the CEQ regulations that implement NEPA.

The Tribe reserves the right to amend or supplement its contentions to address any specific shortcoming which the NEPA analysis may contain, until such time as the NEPA analysis is conducted, but the ability to supplement or amend these contentions has no bearing on the ripeness of the present contention.

However, Contention 8 establishes that NEPA, as implemented by CEQ and NRC

regulations and enforced by federal courts, requires that NRC conduct itself in accordance with the informed decision-making and public participation requirements of NEPA, particularly where

the Tribe seeks to rely on information in the NEPA analysis to inform its own decision-making and participation. Lesser alternatives will not suffice to satisfy legal mandates or the government-to-government relationship afforded Tribes.

Here, long after the close of opportunity to file contentions not subject to discretionary denial, the EIS will presumably contain additional information and data relevant to the Tribes' present ten contentions.

> The EIS should include a description of site-specific and regional data on the characteristics of surface and ground water quality in sufficient detail to provide the necessary data for other reviews dealing with water resources. The EIS should include a discussion of water quantity available for use and possible conflicts between Federal, State, regional, local and American Indian tribe, in the case of a reservation, water-use plans, policies, and controls for the site.

NUREG-1748 at 5-8. Further, the NRC regulations contemplate that the Tribe will play a special role in the preparation of the EIS itself.

> The NRC's regulations require that any affected Indian tribe be invited to participate in the scoping process for an EIS. During scoping meetings for an EIS, for example, staff will solicit input on environmental issues, and the affected communities should be encouraged to develop and comment on possible alternatives to the proposed agency action.

Id. at C-5.

> Potentially interested or affected groups, including civic, American Indian tribes, ethnic, special interest groups, and local residents may have special concerns about the proposed action. Identifying those groups and understanding their interests are effective tools for emphasizing important environmental issues and de-emphasizing less important issues. The NRC encourages enhanced public participation in agency decisions.

Id. at 4-11. Based on the NRC's own Guidance, a Board decision to require the Tribe to participate in these proceedings without the benefit of a full NEPA analysis, including

information on impacts of alternatives developed by the Tribe during a NEPA analysis, is material to the question of whether procedures used in these proceedings would violate the timing and informed decision-making requirements of NEPA.

Last, the Staff and Crow Butte ignore a third, important requirement of the CEQ regulations regarding timing, including the requirement that Staff recommendations be informed by NEPA analysis**.** The applicable regulations state, in relevant part:

> An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (Sec. 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made (Secs. 1500.2(c), 1501.2, and 1502.2). [. . .]

40 C.F.R 1502.5 (Timing).

Here, without conducting any NEPA analysis, NRC Staff has recommended that each and every one of the Tribes' well-pled contentions be rejected and requests that the Board reach the same conclusion. A violation of NEPA has already occurred where NRC Staff's recommendations are not informed by any NEPA analysis that considers the site specific issues of the Crow Butte application. 42 U.S.C. § 4332(C). Should the Board adopt the Staff's position, it would be the final word on the ability of the Tribe to plead admissible contentions that the Board must consider admitting as a matter of right. Current interpretations make the admission of later contentions subject to the discretion of the Board. See *Crow Butte*, CLI-09-09, 69 NRC at 348–51; *Crow Butte,* CLI-09-12, 69 NRC at 566.

Regardless, it is of no consequence that the Tribe may seek discretionary admission of additional contentions at some later date. What does matter is that the Tribe has been required to plead six contentions without benefit of NEPA analysis, and NRC Staff has taken action on these

contentions without conducting any NEPA analysis. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (U.S. 1989)(setting out "NEPA's 'action-forcing' purpose"). Compounding this problem is that NRC Staff has recommended that the Board make final rulings that prohibit admission of the Tribe's contentions, without the benefit of the required NEPA analysis.

Contention 4 provides a specific statement and explanation of a legal issue material to this licensing proceeding which has allowed the NRC Staff and Crow Butte to mount a premature attack on the merits of Contention 4. The Tribe respectfully requests that the NEPA timing issues in Contention 4, as applied to the facts and circumstances of this proceeding, be admitted.

Contention 5: Failure to Consider Connected Actions

Neither NRC Staff nor Crow Butte provides any specific authority to rebut the Tribe's Contention 5, which alleges that NRC Staff and the Environmental Report have failed to comply with NEPA regarding actions being taken by other federal agencies. Moreover, the procedural regulations addressing connected actions and the participation of other agencies as cooperating agencies in the NEPA process are explicitly recognized: "the Commission will [f]ollow the provisions of 40 CFR 1501.5 and 1501.6 relating to lead agencies and cooperating agencies [. . .]." 10 CFR 51.10(b)(2). Neither NRC Staff nor Crow Butte takes issue with the applicability of the specific legal authority on which Contention 5 is based. Petition at 22 *citing* 40 C.F.R. § 1508.25. Although mischaracterized by both NRC Staff and Crow Butte, Contention 5 is a brief, concise, and specific statement of a material legal issue: CEQ regulations impose a duty on the NRC to invite other agencies to participate as cooperating agencies and require compliance with

the CEQ procedural requirement that all connected actions be analyzed in a single EIS. NRC Staff concedes that Contention 5 is material, but argues that is contention is prematurely pled. NRC Staff at 34-35. The NRC Staff disregards the plain language of 10 C.F.R. § 2.309(f)(2), which requires that NEPA contentions be plead at the earliest stages of the proceedings, even though NRC Staff does not intend to prepare an EIS until the latest stages of the proceedings. NRC Staff's "ripeness" argument is frivolous and directly contrary to the very regulations it relies upon.

The Tribe respectfully submits that Contention 5 is a timely submitted, specific, brief, and concise statement of a legal issue where there is a genuine dispute of law, and that Contention 9 must be admitted.

Contention 6: The Environmental Report does not Examine Impacts of a Direct Tornado Strike

Further, the fact that Contention 6 contains sufficient explanation and information is confirmed by the NRC Staff's allegation that tornado risk is very low at uranium ISL Facilities and no design or operational changes are required to mitigate this risk. Contention 6 has therefore provided sufficient information to show that the risk of a tornado strike, and the resulting impacts, are a material issue in the present proceedings. The NRC Staff attempts to rebut site-specific information provided by the Tribe by resting on a generic bare assertion in NUREG-6733/CR that the risk is of a tornado strike is "low." NRC Staff at 36. The NRC Staff claim no meteorological expertise and rely on no site-specific information in making its unsubstantiated attack on the merits of Contention 6.

In direct contrast to the specificity NRC Staff demands of the Tribe's contentions, NRC Staff takes a "good-enough" approach to Crow Butte's application relying on passing mention of severe weather in the Technical Report, which relies entirely on a generic statement in

NUREG/CR 6733. NRC Staff at 36. Likewise, Crow Butte confirms that the only information regarding severe weather is the recitation of generic information contained in "NRC Staff's programmatic assessment in NUREG- 6733/CR" and points to no site-specific information in either the Environmental Report or the Technical Report on which it relies. Crow Butte at 18-19. Crow Butte's attempt to rehabilitate the lack of information in the Environmental Report simply concedes the relevance of severe weather and provides further basis for the admissibility of Contention 6.

Instead, the proffered NRC records show that a tornado has struck the Fansteel Facility, thereby providing unchallenged and unrebuttable evidence that a tornado strike presents a foreseeable risk of damage to an NRC licensed facility. The Tribe again declines to engage in merits arguments as to the full extent of the risk where it is the duty of the Applicant and NRC Staff, in the Environmental Report and the NEPA analysis respectively, to provide this information. Passing mention in a Technical Report of a generic guidance document cannot substitute for information required in an Environmental Report and site-specific NEPA analysis where the National Oceanographic Atmospheric Administration has advised that everyone in this region should "[h]ave a storm safety plan and follow safety guidelines to protect yourself from these hazards." See http://www.crh.noaa.gov/unr/?n=svrtor (NOAA National Weather Service information for Black Hills region of Nebraska).

Contention 6 provides a specific, brief, concise statement and explanation of a genuine dispute which is based on sufficient information to satisfy the NRC requirements for admissibility. 10 C.F.R. §2.309(f)(1).

5. Conclusion

For the reasons set forth herein, the Board should rule in favor of standing for the Tribe to intervene in this matter, and should admit all contentions.

Respectfully Submitted,

/s/ Waonsilawin Cindy Gillis
Waonsilwin Cindy Gillis
Mario Gonzalez
Attorneys for Oglala Sioux Tribe
522 7th Street, Suite 202s
Rapid City, SD 57701
(605) 716-6355
cindy@mariogonzalezlaw.com

Dated at Rapid City, South Dakota
this 4th day of March, 2013.

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
MARSLAND EXPANSION	)	License SUA-1534
(In Situ Leach Facility, Crawford, NE)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply to NRC Staff and Applicant Responses to the Petition to Intervene and Request for Hearing of the Oglala Sioux Tribe in the captioned proceeding were served via the Electronic Information Exchange ("EIE") on the 4th day of March 2013, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Signed electronically by

/s/ Waonsilawin Cindy Gillis
Waonsilawin Cindy Gillis
Mario Gonzalez
Attorneys for Oglala Sioux Tribe
522 7th Street, Suite 202s
Rapid City, SD 57701
(605) 716-6355
cindy@mariogonzalezlaw.com