

Detailed Responses to the March 20, 2013 Standing Rock Sioux Tribe-Tribal Historic Preservation Officer's Letter

As we described in our March 11, 2013 letter to the consulting tribes, the U.S. Nuclear Regulatory Commission (NRC) staff received requests from Tribal Historic Preservation Officers (THPOs), during our initial National Historic Preservation Act Section 106 consultation meetings and via written correspondence, to conduct a field survey within the proposed Ross Uranium In-Situ Recovery (ISR) Project (Ross Project) area in Crook County, Wyoming to identify properties of religious and cultural significance to tribes. Several THPOs indicated that the field survey should be conducted by a contractor selected by the consulting THPOs and in accordance with a Scope of Work (SOW) that would be developed by the consulting parties. Therefore, the NRC staff worked with the consulting parties to develop a SOW that would be used by the contractor selected by several of the consulting tribes (Makoche Wowapi) to conduct a field survey of the Ross Project area. This SOW was provided to Mr. Tim Mentz, Sr. of Makoche Wowapi on December 4, 2012, and Makoche Wowapi provided a cost proposal to the applicant [Strata Energy, Inc. (Strata)] on December 6, 2012. By email dated February 7, 2013, the NRC staff requested an update from Strata on the status of its negotiations with Makoche Wowapi on the cost proposal. Strata notified the NRC staff and the Standing Rock Sioux Tribe-Tribal Historic Preservation Officer (SRST-THPO) by email dated February 15, 2013, that its negotiations with Makoche Wowapi had come to an end and an agreement had not been reached.

The Ross Project Section 106 consultation is the third in a series of consultations, including those for the Crow Butte and Dewey-Burdock projects, during which the NRC staff attempted to follow this process that we call the "SOW approach." As with the Dewey-Burdock project, the SOW approach came to an end for the Ross Project when the applicant and the tribes' preferred contractor could not reach an agreement on a cost proposal.

The NRC staff had considered other alternatives for the Ross Project after the SOW approach had proven unsuccessful for the Crow Butte and Dewey-Burdock projects, recognizing that it might likely prove unsuccessful for the Ross Project as well. The NRC staff anticipated that resolving cost differences would be time-consuming and again delay the field survey work. However, because of differences between the projects, such as the total project area and because the Ross Project consulting parties worked toward the SOW approach, the NRC staff remained optimistic and continued down this path until it did eventually come to the same end.

The NRC staff would like to clarify a few points raised in the SRST letter regarding the SOW approach. The SRST letter indicates that the NRC staff requested, in November 2012, that the SRST-THPO assist in the development of an SOW and requested that the SRST-THPO identify a contractor and tribal personnel to conduct the survey. The NRC staff would like to clarify that it began working with the tribes to develop an SOW in June 2012. The SRST letter also notes that it did not hear from the NRC staff for two months after the SOW was finalized and provided to Makoche Wowapi. It's the NRC staff's understanding that during this period of time, Strata and Makoche Wowapi were negotiating the terms of Makoche Wowapi's cost proposal. No new information was available to share with SRST and other consulting parties regarding this negotiation until the NRC staff and the SRST-THPO were both notified by Strata via email that the negotiations had concluded.

Enclosure 1

As you note in your letter, and as indicated above, Strata notified the NRC staff in February 2013, that it did not reach an agreement with Makoche Wowapi on a cost proposal to conduct the survey in accordance with the SOW. At that point, the NRC staff had become aware that an alternative approach could be successful. This alternative approach, which the NRC staff calls the "Open-Site approach," involves a project site being made available for a time period during which each consulting tribe may send representatives to the project site to conduct a field survey, the applicant provides compensation to the tribe and reimburses the tribal representatives for expenses, and the tribe provides a subsequent survey report. This approach was being used for the Dewey-Burdock and Crow Butte projects and had been used successfully by another federal agency. Therefore, after Strata informed the NRC that it had not reached an agreement with Makoche Wowapi, the NRC staff requested that Strata provide a compensation plan and dates that the Ross Project site could be open to the tribes. The NRC staff requested this information from Strata in order to recommend the Open-Site approach to the Ross Project consulting tribes.

The NRC staff would like to clarify that Strata's input for the Open-Site approach was necessary as Strata, not the NRC, would be providing compensation to the tribes and would need to make the arrangements to allow site access for the tribes. The NRC staff requested this information from Strata so that it could be shared with the tribes along with the other details of the Open-Site approach proposal that the NRC staff developed for the tribes' consideration and input. As an applicant, Strata has a key role in supporting the Section 106 process, but the NRC remains in the leading role in conducting the Section 106 consultation process.

In your letter, you indicate that the NRC staff discarded the SOW developed in consultation with the tribes when selecting the Open-Site approach. The NRC staff would like to clarify that it did not discard the SOW; rather, it took an alternative approach and incorporated many key aspects of the SOW. Specifically, the SOW described the methodology of the field survey and the required contents of the survey report. The NRC staff included several of the SOW details in the Open-Site approach proposal provided to the tribes via NRC letter dated March 11, 2013. Below are the aspects of the SOW that also appeared in the Open-Site approach proposal offered to the tribes:

- Survey of the entire 1,721-acre Ross Project area.
- Compensation provided to the tribes by Strata.
- Consulting tribes to provide survey representatives and monitors to make up the survey field crew.
- Reimbursement to survey participants of lodging, meals, mileage, and incidental expenses by Strata.
- Consulting tribes to provide a written summary of the field work after a certain period following completion of the survey, including an identifying label (e.g. TCP-1), locations, and descriptions of identified sites.
- Confidentiality provisions.
- Consulting tribes to provide recommendations concerning the National Register of Historic Places (NRHP) eligibility of identified sites.

As you note in your letter, the SRST letter challenges the sufficiency of the identification effort that would result from conducting the survey under the Open-Site approach. As shown above, many of the same reporting requirements in the SOW were also included in the Open-Site

approach proposal. The SRST letter states that “it is not in either party’s best interest to pursue a paid site visit where there is no specific methodology, no data collected, and no report that could be shared in order to protect resources in the future.” The Open-Site approach includes a methodology, data collection, and it states that the tribes would provide a report following the survey. The SRST letter also states that the NRC’s March 11, 2013 letter, which proposes the Open-Site approach, states that “The NRC will not require a methodology that the Tribal Representatives must follow when conducting the field survey.” This is actually a partial quote of the NRC staff’s letter. The NRC staff’s letter states, “Beyond the items listed in (1) through (8) above, the NRC staff will not require a specific methodology that the Tribal Representatives must follow when conducting the field survey.” Items (1) through (8) in the NRC staff’s letter include several of those aspects of the Open-Site approach field survey shown above that are consistent with the SOW. The NRC staff’s purpose for stating that no specific methodology would be required beyond these eight items was to be responsive to feedback we had received from the tribes at multiple tribal consultation meetings and teleconferences that the NRC staff should not dictate to the tribes a methodology for conducting the field work and that the tribes should be able to define their own methodology.

Although several consulting tribes expressed interest in conducting a survey after reviewing the Open-Site approach proposal provided by the NRC, this proposal was not put forth as a last and final option. The NRC staff was open to continuing consultation with any tribes that did not wish to follow the Open-Site approach, including the SRST. As such, the NRC staff communicated with the SRST-THPO in March 2013, about alternative approaches, and in April 2013, the SRST-THPO provided an alternative approach template to the NRC staff. The NRC staff and SRST call this alternative approach the “Tribal Working Group (TWG) approach.” This approach uses a Work Plan that allows several tribes to form a TWG to conduct the survey. The TWG approach differs from the Open-Site approach in its compensation and reimbursement specifications and in its reporting requirements, including the stipulation that the NRC staff would be responsible for initially drafting and distributing the survey report to the TWG following the survey.

The NRC staff revised the Work Plan template that was provided by the SRST-THPO to make it appropriate for the Ross Project and shared it with the SRST-THPO and Strata. The NRC staff, the SRST-THPO, and Strata agreed on all aspects of the Work Plan except the requirement that the tribal survey participants be hired by either Strata or the NRC as temporary employees. This requirement was included in the Work Plan by the TWG in order to ensure that tribal survey participants, who are not necessarily employees of a tribe, would be insured against any injuries that could potentially occur or damage that they might cause to private property during the survey. Instead of being hired as temporary employees, the NRC staff recommended that the tribal survey participants obtain insurance to protect themselves from the costs that could be associated with these incidents. Unfortunately, after extensive back and forth negotiation between the parties, the NRC staff and SRST-THPO were not able to resolve this issue and the SRST-THPO notified the NRC staff that the SRST declined to participate in the Ross Project field survey.

The Ross Project tribal field survey was conducted by 27 tribal members representing 10 tribes. Tribes that elected to participate in the survey had the option to participate using either the Open-Site approach or the TWG approach. The first session of the survey was conducted during the period of May 13–17, 2013, and included six tribes, four of which conducted the survey according to the TWG approach. The second session was conducted during the period

of June 3–7, 2013, and included four tribes, all of whom conducted the survey in accordance with the Open-Site approach. Certain aspects of the TWG approach, such as Strata providing lodging and transportation to and from the project site each day, were incorporated into the Open-Site approach during the second session as these aspects worked well during the first session. Each multi-tribe field crew worked together with the support of the NRC and Strata staff to plan the site-specific survey methodology used in addition to the approach provided in the Open-Site and TWG proposals. Strata provided compensation and per diem in accordance with the two approaches as well as maps, work space, and transportation in the field. The NRC project managers, with the NRC contractor's support, provided GPS support for both field crews, planning and oversight, and prepared and distributed the survey report for the TWG. As of August 6, 2013, the NRC staff has received two field survey reports.

Should you have any questions or require further information about the Section 106 review for the Ross Project, please contact Ms. Johari Moore at 301-415-7694 or by email at Johari.Moore@nrc.gov.