

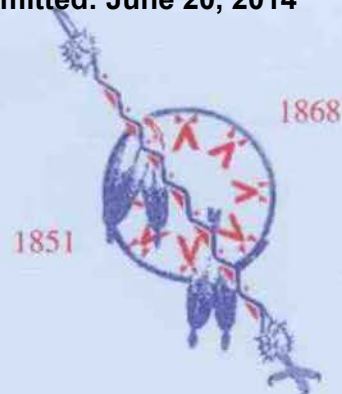
Submitted: June 20, 2014



Oglala Sioux Tribe

Office of the President

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November 5, 2012

Kevin Hsueh, Chief
Environmental Review Branch
Division of Waste Management
and Environmental Protection
Office of Federal and State Materials
and Environmental Management Programs

Re: *Refusal to Accept Dewey-Burdock In Situ Recovery Project Proposal*

Dear Mr. Hsueh:

On behalf of the Oglala Sioux Tribe, I am writing to express our deep dismay with, and strong objection to, the Nuclear Regulatory Commission's ("NRC" or "Commission") October 31, 2012, survey proposal for the Dewey-Burdock *In Situ* Recovery Project ("Project"). The proposal threatens to avoid required consultation with the tribes who have Traditional Cultural Property ("TCP") in the Project Area by working instead with other Indian tribes who have no interest or knowledge of Sioux TCP. The Commission's sole justification for such measures are self-imposed timelines and cost restraints. The Oglala Sioux Tribe objects to the terms of the proposal and to the tactics of the NRC and respectfully suggests that the Commission obey the requirements of federal law when creating its Environmental Impact Statement ("EIS").

The Sioux tribes have dedicated over a year and a half to informal discussions, and over half a year to formal consultations with the NRC over the scope of work, including the extent of the survey area, survey methodology, costs and basic cultural sensitivity and awareness. Despite our attempts to implement the policies and objectives of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, and their implementing regulations, the Commission appears determined to violate both the letter and the intent of these laws.

I would like to remind the NRC of the reason for which NEPA was implemented. NEPA was enacted to assist federal agencies in ensuring that significant environmental impacts are considered in the federal decision-making process and are communicated to the public along with mitigation decisions, thus guaranteeing that relevant information is available to the public who may then provide input into the decision-making process and the implementation of the agency decision. 42 U.S.C. § 4332; *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). It is impossible for the Commission to consider significant environmental impacts of which the Commission has purposely made itself unaware. Moreover, federal agencies are to comply with NEPA "to the fullest extent possible" according 42 U.S.C. § 4332. Your proposal, which rejects all input from the Oglala Sioux Tribe and her sister Sioux tribes and refuses to identify or consider indirect impacts, attempts to evade the requirements of NEPA.

The Commission began gathering information from the Oglala Sioux and other Sioux tribes in 2011. Why? Because the NRC was well aware that the Project site, of approximately 10,000 acres, fell within Sioux territory according to the terms of the Treaties of Fort Laramie of 1851 and 1868, as well as within aboriginal Sioux territory from time immemorial. The Oglala Sioux Tribe continues to assert its sovereignty and right to dominion over the stolen treaty lands and demands true government-to-government consultations over the existence of TCP on these lands. Seven-day ultimatums, threats to use persons with no expertise in Siouxan matters to identify signs of our sacred sites and cultural property and violation of federal treaties and statutes does not constitute good faith consultation.

1. The NRC's Preferred Agency Timeline Is Irrelevant

We have heard, over and over again, from the NRC that it cannot conduct a true scope of work or a full survey because of a self-imposed agency timeframe. An agency is only excused from NEPA compliance when there is a conflicting, shorter statutory deadline in which the agency must make its decision. See H.R. Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969), reprinted in 1969 U.S.C.C.A.N. 2767, 2770; see also *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976).

We understand that the Commission has a timeframe that it would like to keep. However, although breaking a deadline may be very inconvenient, it does not provide the NRC authority to ignore federal law. Many tribal projects have dragged on for years because the federal government has taken its own sweet time to complete the NEPA process, costing tribes millions of dollars and lost economic opportunities. If NRC's Environmental Impact Statement ("EIS") does not comply with NEPA, far greater litigation delays will result for your Project.

2. The NRC's Proposal is Not Designed to Identify Sioux TCP

The Commission is well aware that the Project site is within Sioux lands. Yet, because it cannot agree with the Sioux tribes on the scope of work, the NRC has reached an agreement with the Turtle Mountain Band of Chippewa and the Three Affiliated Tribes of the Mandan, Hidatsa and Arikara Nation to conduct the survey. Surely you are aware that there are 565 federally recognized Indian tribes and that each has its unique history, culture and traditional land base. The Turtle Mountain Band provided you a letter on March 19, 2010 stating that it had no historic properties in the Project area. It is ridiculous to assume that these two non-Sioux tribes, and non-Indian contractors, are expected to be able to identify Sioux sites despite their lack of knowledge on the topic.

In June of 2011, the Sioux tribes visited the Project area and showed the NRC sites that had been missed by your archeological consultants. This merely serves to demonstrate why the NRHP regulations require that federal agencies consult with Indian tribes: "The agency official **shall acknowledge** that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them." 36 C.F.R. § 800.4(c)(1) (emphasis added). It is self-evident that each tribe will have expertise in recognizing its own sacred sites. *The Oglala Sioux Tribe strongly objects to the use of persons without any expertise in Sioux TCP to identify Sioux TCP.*

3. The NRC's Scope of Work is Insufficient to Adequately Identify both Direct and Indirect Impacts

The entire area of direct and indirect Project impacts is approximately 10,000 acres. The Commission is determined to limit the survey to a much smaller area that covers only immediate direct effects. In its letter of September 18, 2012, the NRC argues for a phased approach to identification and that a programmatic agreement regarding indirect effects can be reached at a later time. This is unacceptable, especially considering the bad

faith shown by the Commission thus far in its repeated statements that only survey approaches meeting its time deadlines for the EIS will be acceptable to it. The Oglala Sioux Tribe stands firm that the scope of work must include both direct and indirect effects.

Both the regulations of the Council on Environmental Quality and those of the Advisory Council on Historic Places require consideration of indirect effects. 40 C.F.R. § 1502.16(b); 36 C.F.R. § 800.5(a)(1). In fact, NHPA regulation 36 C.F.R. § 800.16(d) defines "area of potential effects" to mean "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." This is the definition that NRC must use and it clearly includes all 10,000 acres.

In addition, any survey undertaken must involve actual on-the-ground field investigation of one hundred percent (100%) of the 10,000 acre area that may suffer direct or indirect effects. No sampling, predictive model or other alternative is acceptable. Furthermore, the survey must be conducted within protocols agreed to by the Sioux tribes. While we sympathize with your efforts to contain costs, the law requires adequate attempts to identify TCP and contains no provisions regarding cost control. Be assured that the federal government's requirements for Indian tribal projects often require us to incur costs not felt by state governments or private commercial enterprises.

Because indirect effects must be considered, the scope of work cannot be limited to the 2,637 acres proposed by the NRC. Instead, all of the 10,000 acre area must be surveyed so that proper alternatives and mitigation may be considered as part of the EIS. Such a massive survey must be conducted by persons with actual knowledge of Sioux sacred sites and TCP and certainly cannot be conducted within the twenty-one (21) days proposed by the Commission in its October 31, 2012 letter. Please recall that the President of the United States has ordered federal agencies to defer to Indian tribes to set standards, where possible, when creating agency policy. E.O. 13175. Although the NRC, as an independent agency, is not subject the Executive Order, it should strive to comply here because sacred sites and TCP are involved.

4. NRC's Privacy Protections for its Proposed Survey Information are Nonexistent

The Oglala Sioux Tribe is further concerned by the description of privacy protections to be given to information on TCP in the final survey report. The letter report due within fourteen (14) days of the survey "will not show specific site locations of any identified properties of religious and cultural significance. It is understood that this information will be disclosed to the public through NRC's NEPA compliance process, and the information will be tailored to facilitate the preparation of the NEPA document." *Turtle Mountain Band Of Chippewa Indians/Three Affiliated Tribes Tcp Study For Dewey-Burdock* at 2. Shockingly, the proposal does not contain any language indicating that the final report, which will of necessity contain specific site information, will not be shown to the public or that it will be offered any privacy protections. These are sacred sites and there is a very real concern that looters and grave robbers would desecrate them. This is especially disturbing because the Tribe's consulting information might end up being disclosed to the public under the doctrine set out by the Supreme Court in *Dep't of the Interior v. Klamath Water Users*, 532 U.S. 1 (2001). Privacy protections must be carefully negotiated, not created through ultimatums.

5. The October 31, 2012 Proposal Is Not a Good Faith Consultation Effort

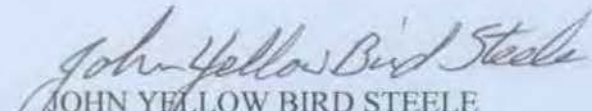
The NHPA regulations require federal agencies to make a good faith effort to identify and consult with Indian tribes that might attach religious and cultural significance to historic properties in the area of potential effects.

36 C.F.R. § 800.3(f)(2). Your failure to take into account the united concerns of the Sioux tribes regarding project scope, your attempts to seek the compliance of other tribes in order to evade Sioux concerns regarding Sioux sacred sites and TCP and your issuance of an ultimatum show a lack of good faith on the part of the Commission. The Oglala Sioux Tribe officially protests that the good faith consultation requirements of the NRHP regulations have not been met by the NRC.

6. Conclusion

For the above reasons, the Oglala Sioux Tribe will not bow to the October 31, 2012 ultimatum of the NRC that it join in the survey proposal. The Tribe issues a continuing objection to NRC's conduct of any survey without written agreement from all seven Sioux tribes on the scope of work, including survey methodology, survey area, consideration of direct and indirect effects, costs, use of Sioux experts in identifying TCP, and privacy concerns. If the Commission fails to stop and consider the many laws which it will break in its haste to meet its self-imposed Project time and cost deadlines, the entire EIS will be inadequate and far more time and money will be needed to correct the problems.

Sincerely,


JOHN YELLOW BIRD STEELE
President
Oglala Sioux Tribe