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
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the	)	
In Situ Leach Facility, Crawford, Nebraska)	)	January 5, 2015

OGLALA SIOUX TRIBE'S COMBINED REPLY TO NRC STAFF'S AND CROW BUTTE RESOURCES' RESPONSES TO TRIBE'S RENEWED AND NEW CONTENTIONS BASED ON THE FINAL ENVIRONMENTAL ASSESSMENT

The Oglala Sioux Tribe ("OST" or "Tribe") submits the following combined reply to NRC Staff's and Crow Butte Resources' responses to the Tribe's renewed and new contentions based on the Board's Scheduling Orders dated October 28, 2014 and November 24, 2014, and the Final Environmental Assessment (October 2014) ("Final EA") for the License Renewal Application of Crow Butte Resources, Inc. ("Crow Butte" or "CBR").

I. ADOPTION OF CONSOLIDATED INTERVENOR ("CI") CONTENTIONS

At the outset of its response, the NRC Staff citing to 10 C.F.R. §2.309(f)(3) challenges the Tribe's "adoption" or "joinder" in certain CI contentions. In its argument, the NRC Staff materially misquotes out of context the Tribe's stated position. The Tribe stated as follows: "In addition to stating interests and contentions unique to the Tribe, the Tribe joins, adopts and *restates* below in *large part* the Final EA Contentions contained in the companion submissions

by Consolidated Intervenors." NRC Staff at 8-9. In other words, the Tribe did not merely adopt or join or the CI contentions as the NRC Staff misrepresents, but "restated" them as the Tribe's contentions to include those portions of the CI contentions that were relevant to or common with the Tribe and include additional statements "unique" to the Tribe, particularly as to those contentions that the raise collectively interest that the Tribe is in a unique position to protect as the representative of the Lakota Sioux peoples and Nation such as those stated on Contentions 1 and 2 (Cultural and Spiritual Resources / Failure to Consult), Contention 3 (Environmental Justice). Many of the Consolidated Intervenors are "members" of the Oglala Sioux Tribe and have individual derivative interests as members of the Tribe, but they are not the Tribe. Thus, much of the interests between Consolidated Intervenors who are members of the Tribe are in common with those of the Tribe itself, but the Tribe itself has collective sovereign interests and responsibilities that are much broader and different in kind than the Tribe's individual members.

In contrast, the remaining contentions are largely questions of environmental science that can be adequately represented by the Consolidated Intervenors. However, the Tribe also restates those contentions, Contentions 4-13, to maintain its own standing and right to participate in the presentation of those contentions to the Board in the event that certain collective interests of the Tribe and its peoples arise that are not otherwise adequately covered by the Consolidated Intervenors. Specifically, Contention 9 (Mitigation Measures), Contention 10 (Cumulative Impacts), and Contention 11 (Alternatives), may raise issues that further engage the collective interests of the Tribe, particularly as they pertain to the caretaker responsibilities of the Lakota Sioux peoples to ancestral Treaty Lands, to the protection of spiritual and cultural resources (see, e.g. statements in Contention 11), and to offsite impacts of CBR's activities such as the contamination of the surface and groundwater that ultimately flows through and under the Oglala

Sioux Reservation. This later interest was specifically discussed in the Commission's earlier opinion rejecting the NRC Staff's and CBR's attack on the Tribe's standing. *Crow Butte Resources* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 2009 WL 1393858 (2009), *4 (Tribe's cultural interests), *5 (Tribe's "nexus" to injury through downstream water contamination) (Memorandum and Order, 6-7, 8-11).

The NRC Staff also misrepresents the effect of the relevant NRC regulation, 10 C.F.R. § 2.309(f)(3). That subsection provides in full:

> (3) If two or more requestors/petitioners seek to *co-sponsor* a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention. If a requester/petitioner seeks to *adopt* the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

The provision relates to those situations where the contentions of the separate parties are "co-sponsored" or are "adopted", in other words, they are identical. The purpose of "restating" relevant portions of another party's contention is not to adopt or co-sponsor that contention, but for the purpose of stating those *portions* of the other party's contentions that are common with the petitioner's together with those additional interests of that petitioner in the contention. The Tribe's "restated" Contentions 1, 2, and 3, for example, are far from identical to those of Consolidated Intervenors.

On the other hand, the Tribe does acknowledge that by reason of its limited resources, and to the extent that it interests are in common, it has cooperated with CI in the development of some of the contentions and does re-state Contentions 4-13 almost identically with CI. As reflected in this Board's recent Order Designating Lead Counsel for February 17 2015

Telephonic Oral Argument, the Board may in such circumstances designate a "lead" counsel to make the arguments for all parties to a common contention while preserving the opportunity of the non-designated party's counsel to make supplemental, not cumulative, arguments and submissions. The NRC Staff itself as well as CBR submitted "combined" responses rather than separate responses to the separate submissions of the Tribe and CI on their contentions. The Tribe's main concern is that it and the Lakota peoples not be silenced for the sake of efficiency where they have submissions and argument that are not cumulative.

If it is the desire of the Board, and pursuant to subsection 2.309(f)(3), the Tribe does agree to have CI act as "lead" counsel as to Contentions 4-8, 12, and 13 in this proceeding and to confer and select a "lead" counsel as to Contentions 9-11, as long as it does not sacrifice the Tribe's opportunity to be heard by the Board on submissions and arguments that relate to supplement matters and matters that are unique to the Tribe, the Oglala Lakota Nation, and the collective interests of the Lakota peoples. Subsection 2.309(f)(3) should not be interpreted as placing efficiency and form over substance or as intending to unreasonably silence a party to a proceeding.

In light of this, the Tribe joins the arguments set forth the Consolidated Intervenors' Combined Reply to NRC Staff and Applicant's Responses to Newly Filed Contentions submitted this day, with the following additional argument:

II. SUBJECT MATTER CONTENTION

The Tribe's Contention F raises the issue of this agency's subject matter jurisdiction by contending that the United States, and derivatively this agency, lacks subject matter over the

territory and lands that were secured to the Tribe by the Fort Laramie Treaties of 1851 and 1868. The NRC Staff and the CBR both respond that this raises a settled question of law and that the contention is not timely raised. As to the latter response, it is well settled that challenges to subject matter jurisdiction may be raised at any time in a proceeding, even on appeal, and are always timely. *Sebelius v. Auburn Regional Med. Center*, 133 S.Ct. 817, 824 (2013); *Henderson v. Shinseki*, 562 U.S. 428, 131 S.Ct. 1197, 1202 (2011) (Board of Veterans Appeals); *Kontrick v. Ryan*, 540 U.S. 443, 444 (2004); *Holden v. Off. of Personnel Management*, 32 M.S.P.R. 367, 368 (MSPB 1987) (Merit Systems Protection Board). A challenge to subject matter jurisdiction may even be properly raised by a party that has previously conceded the tribunal's subject matter jurisdiction over the controversy. *Sebelius*, 133 S.Ct. at 824; *Henderson*, 131 S.Ct. at 1202. Therefore, any assertions as to untimeliness are without merit as a matter of law.

The NRC Staff's and CBR's responses to the substance of the jurisdictional challenge are based on the U.S. Supreme Court's decision in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), and the subsequent application of that decision by the Board in previous decisions in this matter and elsewhere. However, the Tribe, a sovereign entity with an acknowledged "nation-to-nation" relationship with the United States[1] has never accepted the *Sioux Nation* decision nor the authority of the United States to unilaterally "abrogate" the Fort Laramie Treaty of 1868 and not return the lands that the Supreme Court held were wrongfully taken by the United States, and does not accept that decision here as it is ultimately a matter not of domestic US law but of the international law of treaties as a dispute over territory between sovereign nations. Vienna Convention on the Law of Treaties, art. 26 (May 23, 1969), 1155 U.N.T.S. 331, 339; *see also, Dann v. United States*, Case No. 11.140, Report No. 75/02, Doc. 5.1 at 860 (2002).

[1] *See, e.g.*, U.S. NRC, *Tribal Protocol Manual*, Section 1.E (December 2014) (acknowledges that tribes are "sovereign nations").

The United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP") (September 13, 2007), which the NRC Staff dismisses as "not binding" has been repeatedly lauded and paraded before the international community by the United States as recently as a few days ago when it submitted its human rights compliance report to the United Nations Human Rights Council, stating therein:

> The United States has made substantial advances to better protect the rights of indigenous peoples domestically. In December 2010, President Obama announced our support for the UN Declaration on the Rights of Indigenous Peoples, following review and three informal consultations with tribal governments, indigenous groups, and NGOs.

United States Department of State, Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review (February 2, 2015), ¶54; http://www.state.gov/documents/organization/237460.pdf. This representation was made to the United Nations pursuant to the UN resolution that set up the Human Rights Council[2] pursuant to the 1945 Charter of the United Nations and the Universal Declaration of Human Rights[3], both of which the United States were instrumental in drafting and which the United States has signed and ratified. In the UN DRIP, , as discussed in the Tribe's initial submission, the signatory states, including the United States, commit themselves to "recognize, observe, and enforce" and to "honour and respect" treaties made with indigenous peoples, including the Great Sioux Nation. The UN DRIP at article 26 mandates ("*shall*") signatory states to "give legal recognition and protection of [indigenous] lands, territories and resources" and indigenous "land tenure systems." Further, the signatory states to the UN DRIP at articles 19 and 10 respectively, also commit themselves to obtaining the "free, prior and

[2] UN Resolution 60/251 (April 3, 2006).
[3] UN Resolution 217 A (III) (1948).

informed *consent*" before removing indigenous peoples from their lands or engaging in measures that may affect indigenous peoples.

As discussed in the Tribe's initial submission, the United States also signed and Congress ratified the International Convention on the Elimination of All Forms of Racial Discrimination (making it part of US domestic law) and signed and ratified the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man which were the basis of the *Dann* decision against the United States by the OAS Inter-American Commission on Human Rights (of which had and exercised lawful and proper jurisdiction over the United States pursuant to the OAS Charter), but the NRC Staff similarly dismisses this too as "not binding" citing circular rejections by the *executive* branch of the United States of the decisions against the US under these properly ratified international laws by the United Nations Commission on the Elimination of Racial Discrimination in *Western Shoshone v. United States* and by the IACHR in *Dann v. United States*. NRC Staff Response, 11 n. 55.

So according to the NRC Staff the signing of the UN DRIP by the President of the United States and the United States State Department to the United Nations and the international community only a few days ago – *after* the Supreme Court's decision in *Sioux Nation* – along with the ratification by Congress of the UN Charter, the Universal Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination, the OAS Charter, and the American Declaration on the Rights and Duties of Man, all proper and legal international covenants, are all non-binding, meaningless exercises, the terms of which the United States and its agencies can ignore with total impunity. If so, they constitute no less than frauds by the United States upon the international community in regards to the lawful obligations and responsibilities of the United States to indigenous peoples and nations including the Lakota

peoples and the Oglala Lakota Nation. The Tribe would instead prefer to think that these moral declarations and legal covenants are not hollow exercises of US exceptionalism, but actually are meaningful and provide guidance under indisputably enforceable law in deciding questions pertaining to the nation-to-nation relationship between the United States and sovereign indigenous nations, including the Oglala Sioux Nation, such as the nature of indigenous title, the enforcement of treaties with indigenous peoples, and the scope and nature of "consultation" with indigenous nations.

The NRC Staff also appears to contend, without citation to any legal authority, has no authority to apply relevant international law. International law issues have been entertained and decided by many federal administrative tribunals. *See, e.g., In the Matter of VIA USA*, 9 FCC Rcd.5224 (F.C.C.), 9 F.C.C.R. 5224, 1994 WL 495183 (FCC 1994); *Matter of Medina*, 19 I. & N. Dec. 734, 1988 WL 235436 (BIA 1988); *Republic of Panama v. U.S.A.*, 1933 A.M.C. 1662, 1933 WL 62463 (GCC 1933). No agency of the federal government has considered the effect of these international law principles and doctrines and decisions and United States international declarations, many of which are subsequent to the Supreme Court's decision in *Sioux Nation*, upon the continuing validity of the Court's rulings. The Tribe is prepared to present globally esteemed expert testimony in support of its positions on the issues of international law raised by this Contention. *See, e.g., United States v. Hicks*, 2004 WL 3088512 (USDDMC 2004).

For these reasons, Contention F should be admitted.

III. CONTENTION 1 (CULTURAL / SPIRITUAL RESOURCES) AND CONTENTION 2 (FAILURE TO CONSULT)

In regards to Contentions 1 and 2, in its initial submission the Tribe demonstrated that meaning and scope of "consultation" when interpreted in light of the UN DRIP and other legal authority includes obtaining the consent of the Oglala Sioux Tribe to CBR's activities and the NRC's approval of the license for such activities. The NRC Staff again dismisses the UN DRIP as "not legal binding." NRC Staff Response, 16. CBR does not respond to or address this argument or law. As discussed above and in the Tribe's initial submission, tribunals may and should consult and rely upon when helpful "non-binding" declarations and law in interpreting the meaning and scope of legal terms. In *Dann v. United States*, for example, the Inter-American Commission on Human Rights, consulted the American Convention on Human Rights, which has not been ratified by the United States, and even the *draft* American Declaration on the Rights of Indigenous Peoples, in interpreting the scope of legal rights of indigenous peoples in regards to their ancestral treaty lands and natural resources. *Dann v. United States*, Case 11.140, Report No. 75/02, Doc. 5. 1 at 860 (2002), ¶s 94, 97, 129, 131, 150, 161, 163, 164, 167, 168, 171.

As previously mentioned above and in the Tribe's initial submission, the one law that specifically addresses the term "consultation" in regards to indigenous peoples is the UN DRIP which President Obama signed and which the United States lauded in its recent Universal Periodic Report to the United Nations. "States shall *consult* and cooperate in good faith with the indigenous peoples concerned through their own representative institutions *in order to obtain* ***their free, prior and informed consent*** before adopting and implementing legislative or *administrative measures that may affect them*." UN DRIP, article 19 (emphasis supplied). Thus, "consultation" in regards to indigenous peoples, including the Lakota peoples, when interpreted in light of the UN DRIP has as its purpose the obtaining of the "free, prior and informed

consent" of the indigenous peoples concerned *before* adopting or implementing administrative measures that may affect them.

For these reasons, and in addition to those set forth in the contemporaneous submission of the Consolidated Intervenors, Contentions 1 and 2 should be admitted.

IV. CONTENTION 3 (ENVIRONMENTAL JUSTICE)

In its initial submission, the Tribe sets forth in detail the gross inadequacies of the environmental justice considerations contained in the Environmental Assessment prepared by the NRC Staff. The NRC Staff, of course, disputes that characterization. As additional authority for the sufficiency requirements of an environmental justice analysis, the Board is referred to the Board's decision in *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LPB-13-13, 2013 WL 9591753 (November 27, 2013), at pages 140-149, wherein the Board ruled that the environmental justice analysis by the NRC Staff was insufficient and flawed.

III. CONCLUSION

As to all other contentions, the Tribe respectfully refers the Board to its initial submission and to the Reply submitted by the Consolidated Intervenors. For all the foregoing reasons, the Board should find that these renewed and new contentions are admissible.

Signed (electronically) by Andrew B. Reid

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Dated: January 6, 2015, Denver, Colorado.

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the OGLALA SIOUX TRIBE'S COMBINED REPLY TO NRC STAFF'S AND CROW BUTTE RESOURCES' RESPONSES TO TRIBE'S RENEWED AND NEW CONTENTIONS BASED ON THE FINAL ENVIRONMENTAL ASSESSMENT (OCTOBER 2014) were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: February 6, 2015.

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