

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

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| In the Matter of |) | Docket No. 40-8943 |
| |) | ASLBP No. 08-867-02-0LA-BD01 |
| CROW BUTTE RESOURCES INC. |) | |
| |) | |
| (License Renewal for the In Situ Leach Facility, Crawford, Nebraska) |) | July 22, 2016 |

**OGLALA SIOUX TRIBE’S ANSWER TO CROW BUTTE’S
PETITION FOR REVIEW OF THE BOARD’S CONTENTION 1 DECISION**

Pursuant to 10 CFR Section 2.341(b)(3), the Oglala Sioux Tribe (“OST” or “Tribe”) hereby submits this Answer to the Petition submitted by Crow Butte Resources, Inc. (“CBR” or “Crow Butte”) [ADAMS ML 16173A126] in this matter. The Tribe further joins in Consolidated Intervenors’ Answer to Petition for Review [ML16196A420].

INTRODUCTION

Crow Butte seeks review of the March 16, 2015, Memorandum and Order, LBP-15-11 [ML 15075A223], and the May 26, 2016, Partial Initial Decision LBP-16-07 [ML 16147A587], of the Atomic Safety and Licensing Board (“Board”), finding in favor of the Tribe on the timeliness and merits of Contention 1: “Whether the cultural surveys performed and incorporated and incorporated into the [Environmental Assessment] formed a sufficient basis on which to renew Crow Butte’s permit.”¹ Crow Butte contends that the Tribe untimely filed Contention 1 and that the Board “misapplied Commission precedent and ignored NEPA’s ‘rule of reason’ in resolving Contention 1 in favor of intervenors.”

¹ LBP-15-11, 81 NRC 401, 451 (2015).

As the Board acknowledged below, the Tribe is a nation “with unique sovereign status that predates the United States”² and is to be treated as such by the NRC and its Staff as a nation-to-nation, government-to-government, relationship.³ This is particularly true in regards to the identification of Tribal Cultural Properties (“TCP”) under the National Historic Preservation Act (“NHPA”)⁴ and cultural, religious, and spiritual resources under the National Environmental Policy Act (“NEPA”)⁵ that may be impacted by the agency action in renewing Crow Butte’s 10-year license. The Board further recognized “that the Lakota nations, and especially the Oglala Sioux Tribe have a sufficient historic connection to guide the development of the TCP at the license area”⁶ with a “special” “expertise” due to their unique history and relationship with the license area in the identification of TCPs at the license area superior to non-Lakota experts and consultants.⁷

CONTENTION 1 WAS TIMELY FILED

Crow Butte’s first procedural argument, that Contention 1 was untimely filed, was fully considered and rejected by the Board in its March 16, 2015, Memorandum and Order.⁸ Crow Butte contends that the Board erred in finding that the first opportunity to raise contentions on

² LBP-16-07, at 44, *citing Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2030 (2014).

³ *Id.*, at 42-45, *citing* Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (August, 2013) (“NUREG-1748) [Ex. NRC-014]; Executive Order 13175, 65 Fed. Reg at 67,249-50 and 36 C.F.R. § 800.2(c)(2)(ii)(C).

⁴ *See*, Board’s discussion of the NHPA’s requirements at page 12-16 of its decision, especially the Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement, 77 Fed. Reg. 62,268-69 (October 12, 2012) [Ex. NRC-047]; 36 C.F.R. § 800.2, and the 1992 amendments to the NHPA expressly including “[p]roperties of traditional religious cultural importance to an Indian tribe.” LBP-16-07.

⁵ *See*, Board’s discussion of NEPA’s requirements at pages 9, 84, and 86-87 of its decision. LBP-16-07.

⁶ LBP-16-07, at 51.

⁷ *Id.*, at 51, 61, 68, 78 (NRC Staff expert’s testimony), 79-80,

⁸ LBP-15-11, at 7-9, 12-13, especially note 36.

the adequacy of the assessment occurred when the Environmental Assessment (“EA”) [ML 14288A517] was published on October 30, 2014.⁹ Crow Butte contends that the Contention 1 30-day filing period instead ran from September 30, 2013, when the NRC Staff posted a notice¹⁰ about the completion of its NHPA Section 106 review on its public website with a link to its findings,¹¹ or October 1, 2013, when the NRC Staff informed the Board and the parties by letter to the Board of that it had posted on its website “information related to its cultural resources evaluation per Section 106 of the National Historic Preservation Act.”¹²

The Crow Butte application to renew its license (“LRA”) [ML] was filed with the NRC on November 27, 2007.¹³ Following acceptance of the application by the NRC Staff, the notice of opportunity for hearing to contest the LRA was published in the Federal Register on May 27, 2008.¹⁴

On July 28, 2008, the Oglala Sioux Tribe timely filed its Request for Hearing and/or Petition to Intervene.¹⁵ In its 2008 Petition the Tribe asserted “Environmental Contention B”:

The Oglala Sioux Tribe has not been consulted regarding the cultural resources that may be in the licensed renewal area. The Application has identified what it believes to be cultural resources in the area, but the Tribe has had no input on this list, and it therefore cannot be complete. Furthermore, the Applicant has provided that it will work in conjunction with the Nebraska State Historical Society to avoid the identified resources, but this ignores the mandated participation of the Oglala Sioux Tribe.¹⁶

⁹ Petition for Review, 7 n. 17 [ML 16173A126]. 79 Fed. Reg. 64629-31 (October 30, 2014). Board’s Order of October 28, 2014 [ML 14301A317].

¹⁰ Petition for Review, 10-11. <http://www.nrc.gov/info-finder/materials/uranium/licensed-facilities/crow-butte/section-106-license-renewal-docs.html>

¹¹ Petition for Review, 11. ML 13260A566.

¹² Petition for Review, 11. ML 13274A631.

¹³ Ex. CBR-011.

¹⁴ 73 Fed. Reg. 30,426 (May 27, 2008).

¹⁵ Request for Hearing and/or Petition to Intervene, dated July 28, 2008.

¹⁶ *Id.*

Crow Butte¹⁷ and the NRC Staff contested this contention as not ripe¹⁸. On November 21, 2008, the Board ruled in favor of the Tribe, found that it had standing to intervene, and admitted Contention B.¹⁹ The NRC Staff appealed the Board's rulings on the Tribe's standing and the ripeness of Contention B.²⁰

On May 18, 2009, the Nuclear Regulatory Commission ("Commission") affirmed the Board's ruling on standing.²¹ The Commission noted that it was undisputed that the Crow Butte operation sits on the ancestral lands of the Tribe, that the NRC Staff should have consulted with the Tribe when the license was previously renewed in 1995 but did not, and upheld the Board's finding that "the Tribe demonstrated standing based on its interest in preserving cultural resources or artifacts that are on the Crow Butte site."²² The Commission however ruled that Contention B was not yet ripe as the NRC Staff had not yet fulfilled its NHPA obligations.²³ In so ruling, the Commission noted that "[s]uch a contention is usually considered timely if filed within 30 days of publication of the draft environmental impact statement."²⁴

The EA was published on October 30, 2014, at which time the Board issued its order of the filing of contentions pertaining to the EA.²⁵ No draft EA was ever published. The Tribe then filed its Contention 1 as a new EA contention on January 5, 2015, within the deadline contained

¹⁷ ML 802350951.

¹⁸ LBP-08-24, 30, 68 NRC 691 (November 21, 2008).

¹⁹ LBP-08-24, 36.

²⁰ NRC Staff's Notice of Appeal of LBP-08-024, Licensing Board's Order of November 21, 2008, and Accompanying Brief, dated December 10, 2008, pages 21-24.

²¹ CLI-09-09, 69 NRC 331, 2009 WL 1393858, *4 (May 18, 2009).

²² *Id.* ("The past failure of the Staff to consult illuminates the difficulties faced [by the Tribe] in protecting that interest.").

²³ 2009 WL 1393858, *13.

²⁴ *Id.* at n. 105 (citing, *Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, CLI-08-01, 67 NRC 1, 6 (2008)).

²⁵ *Supra*, Note 9.

in the Board's order.²⁶ Crow Butte then challenged Contention 1 on timeliness making the same arguments to the Board that are made here.²⁷ On March 16, 2015, the Board rejected Crow Butte timeliness challenge citing the Commission's ruling in CLI-09-09 at note 105.²⁸ The Board held that its "October 28, 2014 Order established that the deadline for timely filing new environmental contentions would be thirty days (later extended following a joint request from the parties) after the release of the EA."²⁹ The Board then explained the basis for its decision:

Licensing Board Order (Scheduling Filing of New/Amended Contentions and Requesting Proposed Evidentiary Hearing Dates) at 1 (Oct. 28, 2014) (unpublished) ("Following the public availability of the Final EA, new/amended contentions from the intervenors are due within 30 days of issuance of the Final NEPA document."). This is different from contentions challenging the licensee's analysis of environmental impacts following publication of the environmental report. Crow Butte did not significantly amend its ER since its filing in 2008. This recent order clarified—though it did not overrule—the Board's standard rule that "new or amended contentions are to be filed within thirty days after the moving party acquires information giving rise to the new or amended contention," i.e., *contentions challenging the adequacy of the NRC Staff's NEPA analysis require the NRC Staff first to make that analysis available to the public, which occurred here when the EA was issued.* Licensing Board Order (Regarding Schedule and Guidance for Proceedings) (Aug. 21, 2008) at 3 (unpublished). Because the NRC Staff did not publish a draft EA, there was no prior opportunity for Intervenors to review the NRC Staff's analysis of the project's environmental impacts before publication of the EA.³⁰

In other words, the Board distinguished between the analysis contained in a Section 106 TCP survey under the NHPA from the analysis made in an EA pursuant to NEPA.

The information Crow Butte relies on for its timeliness challenge which was published on the NRC Staff's website in September 30, 2013,³¹ with the link to its draft "Section 106 NHPA"

²⁶ ML 15005A541, pages 14-40 (EA Contentions 1 and 2, later combined by the Board (LBP-15-11, at 6)).

²⁷ ML 15030A492, pages 10-12.

²⁸ LBP-15-11, at 8-9.

²⁹ *Id.* at 9.

³⁰ *Id.* at note 36.

³¹ Note 10, *supra*.

findings,³² and the letter to the Board informing it of the website posting,³³ discuss *only* the Section 106 review. Although there is passing reference to NEPA, there is no additional or separate discussion of NEPA’s hard look requirements or any discussion of any TCPs that do not fall within a Section 106 review.³⁴ They are simply not the equivalent of the unpublished “Draft Environmental Analysis” that would provide the Tribe with sufficient notice and information to start the 30-day filing deadline for a contention challenging an EA’s analysis of Tribal historic, cultural, religious, and spiritual interests under 10 C.F.R. § 2.309(b).

A NEPA review for tribal cultural properties and interests is significantly broader than that required by NHPA such that a Section 106 survey may only partly satisfy NEPA’s requirements to take a “hard look” at the indigenous cultural, religious, and spiritual interests of indigenous peoples and nations potentially impacted by the agency action.³⁵ Furthermore, the “hard look” in a NEPA review, properly made, may well correct deficiencies in a Section 106 review, of which the Board in its Partial Initial Decision identified a great many. In the Board’s May 26, 2016 Decision, for example, where the Board remarked on this issue:

Satisfying NEPA means satisfying, at a minimum, the NHPA’s Identification Obligations, and even going further in certain cases. For example, NEPA requires a look at intangible, not just tangible properties, and it is not limited to a focus on historic properties in the same way as the NHPA.

Initially, we note that the NRC Staff’s failure to meet the NHPA’s Identification Obligations renders the EA deficient. Moreover, the EA also indicates that short shrift was given to a review of tangible and intangible TCPs that do not rise to the level of historic properties under the NHPA. Although the EA’s literature review does briefly discuss the general background and the cultural importance of the license area, it makes little effort to acknowledge, let alone evaluate, the specific TCPs that were identified on the site by the Bozell & Pepperl Survey but that

³² Note 11, *supra*.

³³ Note 12 *supra*.

³⁴ *Supra*, Notes 10-12.

³⁵ See *Board’s discussion* at pages 9-11 and 84-87 of its May 26, 2016 Partial Initial Decision. LBP-16-07.

were not categorized at that time as potential historic properties. Also absent is any discussion of the sign or starve encampments or of the NRC Staff's efforts in attempting to locate them. Particularly where, as here, intervening parties proffer admissible contentions challenging the conclusions in the EA that underpin a FONSI determination, the EA must provide a reasonable defense of the NRC Staff's position, or, failing that, the NRC Staff must present credible arguments to cure its deficient EA at an evidentiary hearing.

Dr. Nickens' independent examinations and interviews with experts could help resolve this deficiency, but his notes from his site visit do not cure the EA. In order to ensure that an agency can "respond[] to all legitimate concerns that are raised" under the "hard look" requirement, NEPA insists that high quality environmental information be available to public officials and citizens before decisions are made and before actions are taken. Consistent with this need to make such information available, the NRC Staff's guidance for materials licensing actions explicitly provides that analyses made in conjunction with a NEPA document should be disclosed to the public. Furthermore, NUREG-1748 states that: "The NEPA document must be able to stand alone and provide sufficient analysis to allow the decision maker to arrive at a conclusion."

The NRC Staff's response to comments filed by the participating Indian tribes after the 2012 TCP Survey, deficient under both the NHPA and NEPA, represent a failure to disclose fully in the EA the cultural resource questions at issue in the license renewal. The EA acknowledged that comments were received objecting to the open site TCP survey, and promised "[a] detailed assessment of the report and the comments in the Environmental Impacts section of the EA." Yet the Environmental Impacts section of the EA did not discuss these comments by Indian tribes in opposition to the open site TCP Survey approach taken. Instead, the EA cited to an NRC response, which is nothing more than a form letter acknowledging receipt of the comment. The EA devotes even less attention to Indian tribal comments on the overall NHPA review process, merely positing that such comments "were general in nature," neglecting even to offer citations for those comments.

At a minimum, the NRC Staff was obligated to consider the Indian tribes' views on the TCP survey process and results, instead of disregarding them. This failure supports the conclusion that the NRC Staff did not take a hard look at the Indian tribes' opposing views on how to conduct a TCP survey.³⁶

Obviously, the Tribe would not have this *NEPA* analysis until the EA, or a draft EA, to review to determine whether or not the NRC Staff sufficiently engaged in the required "hard look," particularly of the historic, cultural, religious, and spiritual interests of the Tribe not

³⁶ LBP-16-07, at 84-86 (citations and footnotes omitted).

considered under the Section 106 survey³⁷ until, as the Board and the Commission both stated, the NEPA documents were issued by the NRC Staff.

For these reasons, the website postings and letter to the Board relied upon by Crow Butte for its Petition for Review were not the equivalent of the “hard look” review required by NEPA and did not trigger the 30-day filing deadline for Contention 1.

Further, the governing agency rule, 10 C.F.R. § 2.309(b) and (f), authorizes the presiding officer of the Board to set the deadline for contentions, which was done in regards to contentions pertaining to the Crow Butte Environmental Assessment, including Contention 1.³⁸ The Board has now ruled that the Tribe’s submission of Contention 1 was timely under the Board’s own order. The Tribe should not be foreclosed from protecting its unique and highly important historic, cultural, religious, and spiritual interests in the Crow Butte area after relying upon the order of the Board and the decision of the Commission as to the filing procedure and deadline of this Contention, which was originally filed on July 28, 2008, some 8 years ago. Both the NRC Staff and Crow Butte have been well aware all along of these interests of the Tribe which have been repeatedly raised from its initial appearance in this matter and which were the subject of the evidentiary proceeding that has already been completed and the decision rendered on the merits by the Board. Depriving the Tribe of this opportunity to protect its sacred interests and those of

³⁷ The Board also noted: “The EA claims that this June 2011 meeting, ‘supplemented by literature searches,’ identified the following four previously unknown TCPs: (1) the Crow Butte geologic formation itself (close to and looking over the license area), which was the site of a legendary battle between the Lakota and Crow tribes; (2) a ridge one mile from the Crow Butte site, which is a location for vision quests by tribal members; (3) unspecified medicinal herbs that grow on the license area but purportedly not elsewhere; and (4) the general landscape, as it is steeped in history and dates back to the periods of Fort Robinson, the Red Cloud Agency, and the Great Sioux War.” LBP-16-07, at 19-20 (citations and footnotes omitted). These are other TCPs of great importance to the Tribe that may not qualify for consideration and protection under Section 106 of the NHPA.

³⁸ 79 Fed. Reg. 64629-31 (October 30, 2014). Board’s Order of October 28, 2014 [ML 14301A317].

the Lakota people, as Crow Butte would have it, would defeat the intent and purpose of NEPA, of the NHPA, the trust responsibility of the United States to the Tribe, and of the nation-to-nation relationship fostered in the NRC protocol, particularly where the Board found so clearly for the Tribe on the merits of the Contention.

THE FINAL EA DOES NOT SATISFY THE NHPA AND NEPA

Crow Butte also contends that the Board erred in finding that the NRC Staff's Environmental Assessment failed to satisfy NHPA and NEPA. Crow Butte makes much of the fact that the Tribe ultimately withdrew from the one-sided TCP review process, along with other tribes, after persistent and significant confusion created by the procedures employed by the NRC Staff in conducting the TCP review, by the Staff's delays and often lack of communication, and by its failures to respect the proposals of the tribes and, at least until the end of the process, tribal sovereignty and the government-to-government relationship. However, as the Board noted in its Decision, the burden was on the NRC Staff – not the Tribe - to demonstrate it had fulfilled its responsibilities under the NHPA and NEPA.³⁹ This was the NRC Staff's responsibility regardless of whether or not the consultations with the Oglala's and other tribes was successful.⁴⁰

The Board found that “the NRC Staff's consultation process suffered from years of inaction and delay, a confusing multi-site approach, and for most of the process an absence of sincere respect for the government-to-government relationship that exists between Indian tribes

³⁹ LBP-16-01, at 49.

⁴⁰ *Id.*, at 84, n. 467, *also*, at 70.

and the United States.”⁴¹ While the Board may feel that the Tribe’s withdrawal out of frustration from further consultation with the NRC Staff and the Staff’s tardy efforts to engage in legitimate government-to-government consultations excuses the Staff’s prior great inadequacies in consultation,⁴² the Staff’s many, almost systemic, failures in the consultation process also contributed to its failure to fulfill its primary responsibility under NHPA and NEPA to identify TCPs.⁴³ Crow Butte suggests that the largely hollow and ineffective efforts that were made by the Staff were sufficient to meet this burden. However, as the Board noted, it is not the number of communications that the agency had with the tribes but the substance of those communications, whether or not they actually inform and engage tribes in the review as needed to identify TCPs.⁴⁴

In its approximate 80 pages of discussion of the Contention 1 evidence, the Board exhaustively lays out the great many deficiencies in the Staff’s TCP review that demonstrate that the Staff fell far short of the hard look that NEPA requires. The meat of that analysis by the Board is found at pages 57 through 87 of its Decision. The Tribe cannot improve on the Board’s analysis and rather than repeat it here adopts the analysis of the evidence found there. The significant Board findings of EA deficiencies in TCP identification can be highlighted:

- The previous field survey, the 1988 Bozell & Pepperl Survey, although helpful, was outdated in that it was completed prior to the 1992 amendments to the NHPA and the adoption of the various Executive and NRC orders, policies, and protocols, regarding the protection of indigenous historic, cultural, religious, and

⁴¹ *Id.* at 55.

⁴² *Id.*

⁴³ *Id.*, at 70 (noting the failures of substantive consultation causing failures to identify TCPs)

⁴⁴ *Id.*, at 45 (“an abundance of letters does not equate to meaningful or reasonable consultation.”).

spiritual resources, and the development of the nation-to-nation relationship and the participation of Tribes in the TCP process and review.⁴⁵ The Board noted, for example, that the Bozell & Pepperl Survey team had no specific expertise with Native American TCPs and made no attempt to communicate with any tribes, including the Oglala Sioux Tribe, to assist in the identification of TCPs and that the survey was, therefore, Eurocentric.⁴⁶ The Board also noted that the Survey team improperly discounted cultural resources that did not have “physical integrity.”⁴⁷ This caused the Survey team to ignore important intangible resources and those other resources that did not have “physical integrity,” including, for example, the Crow Butte vision quest site,⁴⁸ the historic sign or starve encampments,⁴⁹ and important or unique indigenous medicinal herbs.⁵⁰ Dr. Redmond also mentioned subsurface survey deficiencies.⁵¹ The NRC Staff failed to address or correct these serious field survey deficiencies in the EA.⁵²

- The Board remarked on the inadequacies of the Eurocentric literature reviews conducted by the NRC Staff’s which it concluded was “by no means sufficient to

⁴⁵ *Id.*, at 58.

⁴⁶ *Id.*, at 58-59; also, at 60-61..

⁴⁷ *Id.* at 59-60. This, for example, would cause the Survey team not to consider the significance of the Crow Butte as a vision quest site. *Id.* Bear Butte (Mato Paha), in the Black Hills north of Crow Butte, is an example of a similar Lakota vision quest site that is on the National Register. www.nationalregisterofhistoricplaces.com/sd/meade/state.html .

⁴⁸ *Id.* at 20, 59-60, 71. Witness traditional Lakota elder and Chief Joe American Horse testified to his personal use of Crow Butte for vision quests. Tr. at 2319. Bear Butte (Mato Paha), in the Black Hills north of Crow Butte, is an example of a similar Lakota vision quest site that is on the National Register. www.nationalregisterofhistoricplaces.com/sd/meade/state.html .

⁴⁹ LBP-16-07, at 61, 85; Ex. INT-031 ¶s 14-15, 26; Ex. INT-032 ¶s 11-12; Tr. at 2268.

⁵⁰ LBP-16-07, at 20, 70; Tr. 2067; Ex. NRC-050 at 8; Ex. NRC-051C.

⁵¹ Tr. 1004; *also*, LBP-16-07, at 62-63 (burial grounds).

⁵² LBP-16-07, at 85 (Dr. Nickens), *also*, 85.

comply with the NHPA.”⁵³ Such reviews “would not be expected to uncover sites of significance to Indian tribes – which for the most part are recorded orally.”⁵⁴

The Board noted that “a literature review [of largely Eurocentric sources] is inferior to the expertise of the Oglala Sioux Tribe witnesses to the contrary [of the Staff conclusions].”⁵⁵ “[A] literature search cannot ascribe meaning to a TCP that the Lakota people would.”⁵⁶ This was compounded by NRC Staff interviews of unqualified historians.⁵⁷ The EA failed to address these issues.⁵⁸

- The NRC Staff failed to enlist its expert, Dr. Nickens, to find new TCPs or historic properties.⁵⁹ After the NRC Staff’s expert, Dr. Nickens, was informed of the possible presence of important medicinal and spiritual herbs, the Staff failed to attempt to seek further information or to locate the herbs.⁶⁰
- The NRC Staff failed to resolve substantive disputes between the Staff, Crow Butte, and the tribes, including the Oglala Sioux Tribe over how the TCP review and survey would be conducted.⁶¹ Contrary to the representations of Crow Butte in its argument, the tribes did submit their own TCP survey proposal prepared by the Makoche-Wowapi.⁶² However, the NRC Staff failed to give the tribes’

⁵³ *Id.* at 64.

⁵⁴ *Id.*

⁵⁵ *Id.*, at 61-62, *also*, 63 (unique indigenous and Lakota worldview).

⁵⁶ *Id.*, at 65 (quoting NRC Staff expert Dr. Nickens); Tr. 2277.

⁵⁷ *Id.*, at 65-66, and 68 (“NRC Staff [failed] to enlist anyone with specific expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to [Indian tribes].”

⁵⁸ *Id.*, at 85.

⁵⁹ *Id.*, at 66.

⁶⁰ *Id.*, at 71.

⁶¹ *Id.*, at 72-79.

⁶² *Id.*, 75-76; Tr. 2255-56; *also*, Tr. 2184-85, 2190.

proposal serious consideration.⁶³

- In essence, there was no TCP Survey completed by the NRC Staff. As the Board stated, “the fact that the NRC Staff decided to go ahead with the open site survey approach, based on consultation with two tribes that could not be expected to identify TCPs of value to Lakota tribes or to the Oglala Sioux Tribe, renders consultation with those tribes about the TCPs within the license area largely meaningless.”⁶⁴ The Tribe’s witnesses with the concurrence of the NRC Staff’s own expert witness, Dr. Nickens, opined that included an extended visit of the area by Lakota elders was required for and appropriate TCP survey.⁶⁵
- The Board concluded that there was no actual survey of the license area as the two tribes that were inappropriately tasked to conduct the TCP surveys never even visited the license area.⁶⁶
- The NRC Staff in the EA acknowledges receiving comments from participating tribes after the 2012 TCP Survey, deficient under both NHPA and NEPA, but did not discuss these comments in the overall review process.⁶⁷

CONCLUSION

It is the position of the Oglala Sioux Tribe that the Crow Butte commercial uranium milling facility is located on lands belonging to the sovereign Oglala Sioux Tribe and its people as part of its “unceded” territory secured by treaty. Article V of the Fort Laramie Treaty of

⁶³ *Id.*; also at 86-87 (the failure of the NRC Staff to consider the tribes’ views on the TCP survey process and results “supports the conclusion that the NRC Staff did not take a hard look at the Indian tribes’ opposing views on how to conduct a TCP survey.”).

⁶⁴ *Id.*, at 52, 79-80 (“Surveyors Were Inappropriate for the Task”)

⁶⁵ Tr. 2274-81.

⁶⁶ LBP-16-07, at 81.

⁶⁷ *Id.*, at 86-87.

September 17, 1851, 11 Stat. 749, and Article XVI of the Fort Laramie Treaty of 1868, 15 Stat. 635. The United States continues to unlawfully occupy and exploit these Tribal lands under a wrongful taking. Act of February 28, 1877, 19 Stat. 254; *Sioux Nation*, 448 U.S. at 381-84, 424. The Sioux Nation, including the Oglala Sioux, has never given up its claim to its treaty lands, has rejected and refused to accept the award and demanded, and continues to demand, the relinquishment of their territory and lands from occupation by the United States. The natural resources that Crow Butte seeks a license from the NRC to continue to exploit, degrade, and destroy for private profit also belong to the Oglala Sioux Tribe and its people.

As the Board recognized as “undisputed,” these are also the ancestral lands of the Lakota peoples, the lands used by both the Crazy Horse and Red Cloud clans, and where Crazy Horse may be buried nearby.⁶⁸ The Crow Butte is an acknowledge traditional vision quest site used by living members of the Oglala Sioux Tribe.⁶⁹ The lands in question are further believed by Lakota medicine people and elders to contain medicinal and ceremonial herbs, former encampments, ceremonial sites, and burial sites, all highly sacred to the Lakota peoples.

The Oglala Sioux Tribe is a sovereign nation to which the United States and its agencies, including the Nuclear Regulatory Commission, have committed to acknowledge and respect with a nation-to-nation relationship.⁷⁰ The Tribe was not even notified or consulted in regards to the original issuance of license by the NRC for the Crow Butte *in situ* uranium mine, nor was it consulted at the time of the first 10 year renewal. As the Board acknowledged, “[f]rom the time the 1992 NHPA amendments were passed until 2011, the NRC Staff and the Oglala Sioux Tribe had never actually consulted meaningfully on a government-to-government basis with respect to

⁶⁸ Tr. 2319.

⁶⁹ *Id.*

⁷⁰ *See especially*, NRC Tribal Protocol Manual, *supra*, Note 4.

the Crow Butte mining license for this site.”⁷¹ The Tribe attempted to raise this Contention in 2008 at the first opportunity it had to become involved but was told it was premature.

The Tribe has diligently continued to raise its concerns about the historic, cultural, and spiritual interests that it shares with its people to these ancestral lands, but the long overdue opportunity to be heard is now challenged by the Canadian-owned company that is despoiling and profiting off of Sioux treaty lands as having lost that opportunity for failing to respond to an agency *sua sponte* website posting on an NHPA Section 106 survey that Crow Butte contends was an Environmental Assessment of those tangible and intangible sacred interests. The actual time between the website posting and the Tribe’s filing of Contention 1 pursuant to the Board’s filing-deadline-setting order following the publication of the EA was approximately 2 months. The Tribe urges the Commission to reject Crow Butte’s highly inequitable form-over-substance argument and reach and affirm the merits of the Board’s thorough decision on Contention 1.

Respectfully Submitted,

Signed (electronically) by Andrew B. Reid

Andrew B. Reid, Esq.
The Ved Nanda Center for International
& Comparative Law
University of Denver Sturm College of Law
2255 East Evans Avenue
Denver, CO 80208
Tel: 303.437.0280 / Fax: 303.832.7116
Email: lawyerreid@gmail.com

⁷¹ LBP-16-07, at 31.

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 ANSWER TO CROW BUTTE'S PETITION FOR REVIEW OF THE BOARD'S CONTENTION 1 DECISION were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: July 22, 2016.

Signed (electronically) by Andrew B. Reid

Andrew B. Reid, Esq.
The Ved Nanda Center for International
& Comparative Law
University of Denver Sturm College of Law
2255 East Evans Avenue
Denver, CO 80208
Tel: 303.437.0280 / Fax: 303.832.7116
Email: lawyerreid@gmail.com