



Oglala Lakota

Cultural Affairs & Historic Preservation

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May 31, 2017

Cinthya I. Román, Chief
Environmental Review Branch
Division of Fuel Cycle Safety, Safeguards
and Environmental Review
Office of Nuclear Material Safety
and Safeguards

Dear Ms. Román,

This letter seeks to make a positive contribution to the discussions initiated at the in-person meeting on May 19, 2016 on the Pine Ridge Reservation. As NRC Staff set out in its summary of that meeting, the NRC and Tribe may be able to identify a mutually acceptable survey methodology. As we have subsequently discussed, however, there is a fundamental lack of accepted methodology in the informal approach most recently proposed by NRC Staff and the applicant, Powertech. This letter first addresses the shortcomings of the NRC Staff proposal and then outlines the basis for further discussions with NRC Staff in carrying out the NRC's statutory duties and government-to-government consultations.

The Oglala Sioux Tribe Cultural Affairs and Historic Preservation Office (“the Office”) received the letter dated April 14, 2017 regarding NRC Staff's proposal for effecting a survey of cultural resources on the Dewey-Burdock site. While the Office appreciates the proposal, it appears to be virtually identical to the former “open-site” proposals made by NRC Staff that have been rejected by every single Lakota Sioux tribe that has considered this approach. For the multiple reasons presented to NRC Staff on the record in the past, and reiterated in this letter, this proposal remains unacceptable in its current form.

However, as NRC Staff is aware, the Office remains focused on and committed to ensuring a competent and complete survey of cultural resources at the site. To further develop and encourage a detailed discussion between the affected Lakota Sioux tribes and NRC Staff over the parameters necessary for an acceptable cultural resources survey, the Office has gone back through the record in this matter, and in other relevant proceedings, involving the Office and NRC Staff's attempts to fulfill its obligations under the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA). This effort reveals opportunities to

address the Office's concerns, meet NRC Staff's legal obligations, and ensure the meaningful involvement of other affected tribal historic preservation offices.

In the meantime, the Office is compelled to reassert its strong objection to NRC Staff's continued support for keeping the license issued to the applicant in this matter active and effective despite the express findings of illegalities by the Atomic Safety Licensing Board and Nuclear Regulatory Commission. As the Office has repeatedly informed NRC Staff, the Office believes this decision to leave the license in place violates federal laws and serves to hamper trust, communication, and the ability to develop a better relationship for purposes of resolving the present issues with NHPA and NEPA compliance.

With respect to the "open-site" survey NRC Staff has recently re-proposed, the past communications between the Office and other tribal historic preservation offices demonstrates the serious frailties with this approach. As is evident in the administrative record for both the Dewey-Burdock licensing proceeding and the Crow Butte Resources licensing renewal proceeding, the "open-site" survey approach has been repeatedly and forcefully rejected by all of the Lakota Sioux tribes. For instance, multiple letters from the Standing Rock Sioux Tribal Historic Preservation Office, included in the referenced Dewey-Burdock and Crow Butte records, provide a detailed basis for the Tribes' disapproval of the "open-site" approach. These letters demonstrate that as early as 2011 the Tribes had specifically objected to any NRC Staff approach that lacks identification of acceptable protocols and methodologies for cultural site identification. October 15, 2012 letter from Terry Clouthier, Standing Rock Sioux Tribal Archaeologist, to Kevin Hseuh, Chief, Environmental Review Branch (ML12298A142). That October 2012 letter was sent to Mr. Hseuh after NRC Staff had informed the Tribes on October 12, 2012 that despite the significant effort, time, and resources the Tribes had expended in soliciting, discussing, and preparing their own cultural resources survey proposal, NRC Staff would not consider the Tribes' proposal – nor provide any detailed basis or discussion for its rejection.

Again on February 20, 2013, the Tribes provided to NRC Staff an even more explicit rejection of the "open-site" approach. Letter from Terry Clouthier, Standing Rock Sioux Tribal Archaeologist, to Kevin Hseuh, Chief, Environmental Review Branch (ML14247A401). In the February 2013 letter, the Tribes objected not only to the NRC Staff's evident fidelity to the applicant's fiscal constraints over the requests of the Tribes (and the NRC Staff NEPA and NHPA obligations), but also the lack of effort to ensure any survey involves a proper methodological framework to conduct the necessary cultural resources survey. That letter provides a detailed review of the financial shortcomings of the proposal with its "honorarium" given the technical investigation and reporting necessary for a competent survey. That letter also objects to the manner in which NRC Staff has made the "open-site" proposal – as much more on an ultimatum than any invitation for a detailed discussion of what components such a survey should involve.

The Office refers NRC Staff to these letters as they were included and referenced in the Office's comments and filings during the previous NEPA and ASLB hearing process and continue to fairly represent the Office's current position regarding the most recent "open-site" proposal, which remains virtually identical to those previously proposed. The Office sincerely hopes, however, that the NRC Staff does not intend the current proposal as an ultimatum, but rather a starting point for more detailed discussions. Simply put, such an ultimatum would not

provide the Office a reasonable opportunity to identify concerns, advise on identification of resources, articulate its views on impacts, and participate in the resolution of adverse effects.

In this spirit of further discussing a mutually acceptable proposal, the Office wishes to bring to NRC Staff's attention a number of points reflected in the administrative records for both the Dewey-Burdock proceeding and the Crow Butte expansion proceeding, which the Office believes bear directly on the issues at hand. As an initial matter, it is important to recognize that a physical survey of the site must be conducted in order to allow for identification of cultural resources, and that a simple literature review, background check, or some similar effort is not sufficient. This was the testimony of the NRC Staff's expert, Dr. Nickens, in the Crow Butte expansion license proceeding, to which the Oglala Sioux Tribe was a party, when discussing the "statement of work" for conducting such a survey:

2 DR. NICKENS: Well, the Statement of Work
3 is the approach. The background check I wouldn't
4 really consider a suitable technique. That's really
5 a literature search usually to identify potential
6 TCPs, but that's usually done outside of tribal
7 effort.
8 CHAIR GIBSON: And that would be something
9 that would sort of augment one of these other
10 approaches, is that right, doing these historical
11 background checks?
12 DR. NICKENS: That's correct. And in my
13 opinion, should be a corollary to any of the studies.

Transcript of Hearing conducted August 27, 2015 (Docket No. 40-8943-OLA) (ML15244B278) at p. 2024. Also of great importance is the fact that the expertise of the Lakota Sioux is essential to a meaningful and comprehensive survey. As NRC Staff's expert Mr. Goodman testified, also in the Crow Butte expansion license proceeding:

10 MR. GOODMAN: No, I would not say that,
11 Your Honor. I would say one of the big take aways
12 from that meeting is that TCP surveys are -- the
13 tribes have a unique expertise to identify these
14 surveys. So one of the big take aways was that staff
15 felt that it was very important to have a TCP
16 conducted by the tribes.

Id. at p. 2097. *See also Id.* at p. 2062 at lines 17-22 ([CHAIR GIBSON:] "the tribes indicated they were unable to provide the NRC staff with specific feedback about any cultural sites without first doing a TCP survey. Does that sound right to you, sir? MR. GOODMAN: More than sound right, Your Honor. That's right."). This point was also repeatedly expressed in the Dewey-Burdock proceedings hearing. *See, e.g.*, Transcript of Hearing conducted August 19, 2014 (Docket No. 40-9075-MLA)(ML14234A449) at p. 860, lines 1-8; p. 762, line 24 to p. 763, line 6.

With respect to the Dewey-Burdock site, as has been communicated to NRC Staff for several years, the Office asserts that there must be an effort to coordinate the several different

Lakota Sioux Tribes before designing and conducting a cultural resources survey. *See, e.g.*, Transcript of Hearing conducted August 19, 2014 (Docket No. 40-9075-MLA)(ML14234A449) at p. 794. While the Office understands that NRC Staff is under an obligation to conduct consultation meetings with the Oglala Sioux Tribe specifically, and the Office wishes to take part in those, coordination of a cultural resources survey must include the other Lakota Sioux tribal governments at the earliest stages in order to be competent in its analysis of Lakota Sioux cultural resources.

The Office strongly maintains that the best manner to conduct a proper survey is to involve a contractor(s) with the necessary experience, training, and cultural knowledge to carry out and facilitate the survey. This approach was endorsed by NRC Staff's expert in the Crow Butte expansion proceeding hearing:

12 DR. NICKENS: Mr. Goodman covered it
13 pretty well in sketchy detail. In my experience,
14 probably the best TPC survey approach is to involve
15 Tribal Elders, wherein if it's one tribe or a group of
16 tribes would supply elders of their choice and then
17 there would be a facilitator, something along the
18 lines of a cultural anthropologist who would accompany
19 the elders and provide logistics support,
20 documentation, recording support, report preparation
21 if that were necessary. That's usually been the best
22 approach that I've seen.

Transcript of Hearing conducted August 27, 2015 (Docket No. 40-8943-OLA) (ML15244B278) at p. 2023. Similarly, in the Dewey-Burdock record, the Tribes repeatedly communicated this need for a contractor/facilitator, which is what gave rise to the Tribes' cultural resources survey proposal presented to, but disregarded, by NRC Staff.

With respect to specific protocols and methodologies that should be incorporated into any competent cultural survey approach, on multiple occasions during his testimony during the Crow Butte expansion proceeding hearing, Mr. Catches Enemy addressed the issue in his testimony:

3 [MR. CATCHES-ENEMY]: If the survey was to be done the way the
4 tribes had wanted to, not only would they probably
5 have had the on-the-ground survey cultural resource
6 specialist, they would have conferred with tribal
7 elders, spiritual advisors, spiritual leaders; a lot
8 of people know them as medicine men, medicine women,
9 on the findings that were in the field. A lot of our
10 tribal elders are not able to walk out, you know, in
11 transects to identify some of these special places
12 that haven't -- if you're thinking about any one of
13 these project areas, our people have been displaced
14 from them for a long time, a very long time. So the
15 connection remains regardless of that displacement
16 from having access to these places.
17 I think it's mentioned several times in

18 some of the testimony from some of the tribes that
19 were participating either on the bus tour in June of
20 2011 that a lot of them hadn't ever been to or had
21 access to these places before because of probably the
22 land ownership or the companies that had taken the
23 placement of their companies at these locations.
24 So, to be able to have access for the
25 period that is required to do a proper identification
1 I think was what the tribes were trying to push. And
2 I think that proposal was rejected maybe for the
3 monetary reasons; I'm not sure, but the know that the
4 tribes were really trying to look at including the
5 spiritual and cultural significance to do a full
6 analysis. So it wasn't just to be limited to the NHPA
7 Section 106 requirements, but also the hard look under
8 NEPA.

Transcript of August 28, 2015 (Docket No. 40-8943-OLA) (ML15252A189) pp. 2244-2245.
Mr. Catches Enemy further testified:

6 MR. CATCHES-ENEMY: Again, that discussion
7 would have to be reexamined with the other Tribal
8 Historic Preservation Offices, their advisory council
9 members as well as any of their elders and spiritual
10 advisors. So as far as putting a time frame on how
11 long a reasonable TCP survey could occur, I wouldn't
12 want to lock myself into stating that.

Id. at p. 2274. Mr. Catches Enemy explained:

15 MR. CATCHES-ENEMY: Yes, based on
16 archeological training and methodologies TCP surveys
17 have a different aspect which don't typically follow
18 those same guidelines, still trying to perform under
19 NHPA, Section 106 parameters, however there's a huge
20 cultural component that I mentioned before that we
21 keep in mind with NEPA, the hard look with NEPA, that
22 involves a broader context than just maybe material
23 items or tangible items that are identified or that
24 can be touched.
25 When we start talking about the spiritual
1 components, that's something that an archeologist
2 would never document. They will not document
3 something that's intangible, something that's specific
4 to practices, beliefs, mores of a tribe or an
5 indigenous group. So a TCP survey is quite extensive,
6 and that's why I didn't want to limit to maybe even
7 just one year. I would say a couple years.
8 When you're talking about that large of an

9 audience, as far as that many tribes to be involved,
10 to get a good feel for the area, maybe in different
11 seasons -- maybe they want to be out there during
12 different seasons, maybe they want to be out there
13 when the ground visibility is the best, or maybe there
14 are ceremonies to be performed during that time at the
15 elders' discretion. That's something you'll never see
16 with an archeological survey.

17 CHAIR GIBSON: Yes, sir.

18 MR. CATCHES-ENEMY: You're going to get
19 out and do the transects, do the recording, the
20 reporting and it'll be a final product made on --
21 based on a different cultural mind set.

Id. at p. 2275-2276. This same basic premise of the need to carry out a cultural resources survey in a fashion consistent with the Lakota Sioux cultural values was discussed and elaborated on in the Dewey-Burdock licensing hearing as well. *See* August 19, 2014 Transcript (Docket No. 40-9075-MLA) (ML14234A449) at p. 800-801.

Chairman Gibson in the Crow Butte expansion proceeding turned to the NRC Staff's expert, who affirmed the points Mr. Catches Enemy expounded upon:

22 CHAIR GIBSON: Okay. Dr. Nickens, do you
23 think Mr. Catches-Enemy is being overly conservative
24 or overly aggressive in how long he believes this
25 would take to do a realistic TCP survey involving all
1 these tribes?

2 DR. NICKENS: It's difficult to respond to
3 that, Your Honor.

4 CHAIR GIBSON: Yes, sir.

5 DR. NICKENS: It totally depends on the
6 scope of work as Mr. Catches-Enemy has just mentioned,
7 the involvement of elders, which based on my reading
8 of the proposals leading up to this point that have
9 been offered, I don't see elder involvement in any of
10 those. So it's kind of apple and oranges here as to
11 what Mr. Catches-Enemy is talking about.

12 He is absolutely correct in the way that
13 the tribal people, particularly the elders and
14 religious leaders, would look at the resource compared
15 to the way I as an archeologist would. We can
16 identify the tangible resource on the ground. If we
17 used the Crow Butte butte as an example, I can
18 document it, I can record it, I can do a literature
19 search, but in no way could I ascribe the cultural
20 meaning to that that the Lakota people would.

21 Now back to the basic question, in my
22 experience with various project areas in the Western
23 United States and the involvement of tribal elders and

24 groups and the entire process, taking the elders to
25 the field as possible, identifying resources,
1 documenting those resources, recording and then
2 transcribing in to a report that would be used by the
3 parties in the long run, I would guess -- and I would
4 put it in a matter of months. Maybe in this case; and
5 this is just a wild stab, I'd say eight to nine
6 months.

7 CHAIR GIBSON: Okay. Very well. Thank
8 you.

9 MR. YELLOW THUNDER: Your Honor, if I may
10 add a little bit to --

11 CHAIR GIBSON: Oh, yes, Mr. Yellow
12 Thunder.

13 MR. YELLOW THUNDER: -- what my colleague
14 Mr. Catches-Enemy has previously discussed. I'd just
15 like to put it on the record that throughout this
16 entire process from beginning to end to this point the
17 staff, the Applicant, consultants have used different
18 tactics, ploys and maneuverings in which there's
19 almost a total disregard for our customs, our beliefs
20 and our way of life. Often we have been pushed into
21 a corner. An example is we want this scope of work
22 tomorrow. Another example is we want this survey TCP
23 completed yesterday. And if you don't, we're going to
24 go ahead and do it our way.

25 So in regards to the timeline, time frame
1 in which this work is conducted in our way, we always
2 have deferred to our elders because they have the
3 wealth of knowledge that we do not possess, and we
4 would not dishonor them in any way. So we have always
5 taken the time to be certain that what we are looking
6 at is what we are looking at, because what is out
7 there and the things that have been uncovered by the
8 consultants and archeologists that they have found is
9 often -- the numbers are often very different. They
10 have discovered 20 sites. We have gone out and
11 discovered 200 sites. And in that time period we have
12 allowed prayer and ceremony and spirituality to guide
13 us. So it is very important that we don't rush into
14 these things.

15 CHAIR GIBSON: Yes, sir.

16 MR. YELLOW THUNDER: And we often will
17 take the time to, like I was saying, defer to our
18 elders. We didn't get to where we are today by
19 rushing into things.

20 CHAIR GIBSON: Yes.

21 MR. YELLOW THUNDER: But thank you. I
22 just wanted to add that.

23 CHAIR GIBSON: Thank you, sir. We will
24 stand in recess for 10 minutes. Thank you.

Id. at p. 2276-2279.

Dr. Nickens later clarified that his estimate of 8-9 months included not just the field work, but also the additional work of preparing reports, and other non-field work. However, the point remains that an “open-site” approach as proposed by NRC Staff, with no coordination amongst the Tribes or protocols or approaches identified for making or documenting observations, is not suitable for satisfying the requirements of NEPA and the NHPA. As far as timelines, the “open-site” proposal from NRC Staff asks the Office to identify a two-week period to conduct all field work. This directly contradicts the Oglala Sioux Tribe’s testimony in both proceedings identified above and ignores Mr. Yellow Thunder’s request that NRC staff avoid pushing the Tribe into a corner.

In order to address the issues the Office identified at the in-person meeting with NRC Staff, the Office respectfully requests NRC Staff re-evaluate and come back to the table for discussion. The Office asserts, as presented in the testimony copied above, that the methodologies, protocols, and timing need to account for the cultural needs of the Lakota Sioux – including the ability to use tribal elders and other experts as resources in a coordinated fashion with other tribal historic preservation offices. The Tribe wishes to engage NRC Staff in a much more detailed discussion of how these components can be incorporated into a cultural resources survey approach. The Office understands that NRC Staff and the applicant were not ready to accept the September 27, 2012 Makoche Wowapi proposal that the various Lakota Sioux tribes had generated through significant effort. ML15222B282. However, the failure of one attempt in 2012 should not eliminate the possibility of using a contractor for such important work.

Recognizing the progress made at the May 19, 2016 in-person meeting between the Office and NRC Staff, the Office re-asserts its strong preference for face-to-face meetings to discuss these matters, elaborate positions, and come to agreement on details. The importance of face-to-face communication over these cultural resources issues has been reiterated repeatedly during both the Dewey-Burdock proceedings and the Crow Butte expansion proceedings. *See, e.g.,* Transcript of Hearing conducted August 27, 2015 (Docket No. 40-8943-OLA) (ML15244B278) at 2171, line 24 to p. 2172, line 3 (“MR. YELLOW THUNDER: We would rather have face to face dialogue. That was not just the view of our tribe, but a view of Cheyenne River Tribe and Rosebud and all of the other tribes that were involved in this.”); Transcript of Hearing conducted August 19, 2014 (Docket No. 40-9075-MLA) (ML14234A449) at p. 826 (“MR. CATCHESENEMY: Throughout the whole process I can say that the tribes, especially the Oglala Sioux Tribe, have always advocated for the face-to-face.”). Consistent with the approach, the Office specifically requests that significant further discussion take place on a face-to-face basis. As a start, the Office requests that NRC Staff come to the Pine Ridge Reservation to discuss the contents of this letter, the NRC Staff’s April 14, 2017 letter, as well as the other relevant issues such as the Tribes’ detailed critique of the Programmatic Agreement. *See* Letter dated February 5, 2014 from Oglala Sioux Tribe President Bryan V. Brewer to Haimanot Yilma, NRC Staff, with accompanying email and line-by-line PA comments dated February 20, 2014 from Wašté Wiñ Young, Standing Rock Sioux Tribe Historic Preservation Officer to NRC Staff (ML14241A448) at pp. 132-159.

Further, in his testimony during both proceedings, Mr. Catches Enemy explained the importance of involving the elected members of the Oglala Sioux Tribal Council in order to ensure the proper level of Section 106 NHPA government-to-government consultation and communication. Transcript of Hearing conducted August 27, 2015 (Docket No. 40-8943-OLA) (ML15244B278) at pp. 2050-2051; pp. 2124-2125. This is also consistent with Ordinance No. 11-10 of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe which mandates that while technical staff may engage in discussions and deliberations with federal governmental agencies, the Oglala Sioux Tribal Council must be included in government-to-government consultation.

With respect to the participation by NRC Staff, testimony from NRC Staff experts indicates a practice of designating one “decision maker”:

MR. GOODMAN: The designated agency
5 decision maker under the National Historic
6 Preservation Act. Each agency has to designate a
7 decision maker. In that case, it is Larry Camper, Mr.
8 Camper, Your Honor.

Id. at p. 2129. The Office requests that NRC Staff specifically confirm the identify this decision maker for how the NHPA consultation process will be conducted, and that this person be directly involved in the discussions, face-to-face and otherwise, including those conducted with the Oglala Sioux Tribal Council representatives.

We look forward to continuing to work with NRC Staff regarding the cultural resources survey for the Dewey-Burdock property. Please inform my office as to your willingness to conduct further discussions. As you note in your letter, July can be a particularly difficult month, but there should be no reason a schedule and plan cannot be established during the month of June to further the discussion and set dates for in person meetings between NRC Staff, Office staff, and the Oglala Sioux Tribal Council representatives.

Because this matter involves ongoing litigation in the D.C. Circuit Court of Appeals, please follow the applicable litigation protocols and please involve the Tribe’s attorneys for this matter in all communications.

Sincerely,

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