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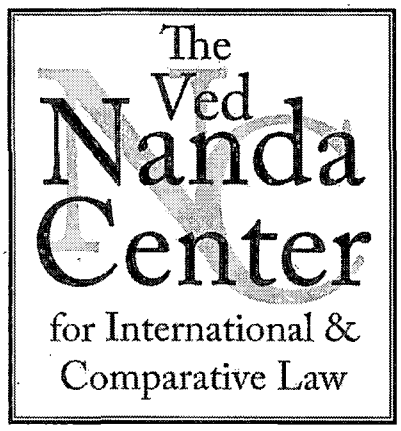

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Via E-Submission

January 29, 2018

82 FR 59665
12/15/2017
(4)

ATTENTION: May Ma
Office of Administration
Mail Stop: OWFN-2-A13
US Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Crow Butte Resources, Inc.: Marsland Expansion Area –
Draft Environmental Assessment
Docket No. ID NRC-2012-0281 - Comments

To the US Nuclear Regulatory Commission:

Pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4231, *et seq.*, and the relevant regulations of the US Nuclear Regulatory Commission (NRC), 10 C.F.R. part 51, and the Notice published on December 15, 2017 at 82 Fed.Reg. 59665-59666, please accept this as the comments of the Oglala Sioux Tribe (also known as the Oglala Lakota Nation) and its citizens, the Lakȟóta Oyate (people), a sovereign nation of the *Očhéthi Šakówiŋ* (the Great Sioux Nation), in regard to the Draft Environmental Assessment (EA) issued by the US NRC on the Crow Butte Resources, Inc. License Amendment Application for the Marsland Expansion Area.

The Draft EA for the Marsland Expansion Area (MEA) fails to meet the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4231, *et seq.*, the National Historic Preservation Act (NHPA), 16 U.S.C. § 470, *et seq.*, and implementing regulations, including NRC regulations in 40 C.F.R. Part 51, specifically including 10 CFR §51.45, §51.10, §51.70, and §51.71, because the Draft EA does not provide analyses that are adequate, accurate, and complete in all material respects to (i) demonstrate compliance with all laws, including treaties, international law, and human rights obligations; (ii) sufficiently demonstrate that spiritual, cultural, and historic resources within the project area and the affected area are identified and protected pursuant to both NEPA and Section 106 of the NHPA; or (iii)

adequately describe the affected area and environment and the potential impacts upon them. The Draft EA does not satisfy NEPA's "hard look" standard which requires broader considerations of the cultural and historic interests of the Tribe and its citizens (members), including spiritual and other non-tangible interests. It fails to conduct a required proper Environmental Justice analysis under NEPA that considers the interests of the Tribe and its members. It fails to demonstrate that the risks to the environment, including both surface and groundwater resources have been adequately considered.

As to the latter issues, The Tribe hereby adopts and incorporates herein by reference the comments submitted by its individual members participating through Aligning for Responsible Mining, Owa Aku, Bring Back the Way, and / or the Western Nebraska Resources Council. Regarding the other issues, the Tribe submits the following comments.

Substantial issues remain concerning undetermined impacts to the Tribe's cultural and historic resources. The Draft EA carries forward serious problems from the application stage. Despite having years to do so, neither Crow Butte Resources, Inc. (CBR) nor NRC Staff have provided the Tribe, or other interested parties including but not limited to the Tribe and other members and citizens of the Očhéthi Šakówiŋ, a meaningful opportunity to be involved in the assessment or determination of the significance of the identified sites, nor a meaningful opportunity to identify additional sites that may warrant evaluation or listing.

Submitted herewith and incorporated herein as though set forth in full for consideration are: (1) the 2013 Opinion Letter of Dr. Louis Redmond concerning cultural resources at the Marsland Expansion Area (the "2013 Redmond Opinion") (ML13029A820), details the problems with CBR's approach to cultural resources surveys and tribal consultation under NHPA; (2) the Declaration of Michael Catches Enemy (ML15132A470) which sets forth the historic, cultural, and spiritual interests of the Oglala Lakȟóta Oyate (Oglala Lakota people and Tribe) and the Očhéthi Šakówiŋ (the Great Sioux Nation), and (3) the Declaration of Dennis Yellow Thunder (ML15132A471) which also sets forth the historic, cultural, and spiritual interests of the Oglala Lakȟóta Oyate and the Očhéthi Šakówiŋ.

The EA errors are largely of omission – failure of the Draft EA to conduct required analyses and failure to review necessary components of the project – and thus do not require an expert opinion in support.

The Tribe's comments herein raise issues with respect to the sufficiency of the Draft EA under the National Environmental Policy Act and various laws including treaties and international law, the National Historic Preservation Act, and applicable regulations, including those of NRC, the federal Advisory Council on Historic Preservation ("ACHP"), and the Council on Environmental Quality ("CEQ"). At minimum, each insufficiency set forth below implicates and asserts violations of 10 C.F.R. §§ 51.10, 51.70, and 51.71, which require NRC compliance with all provisions of NEPA as well as any other applicable international, federal, state, and local requirements.

Failure to Discuss or Demonstrate Lawful Federal Jurisdiction and Authority Over CBR's Activities

The Draft EA fails to discuss, let alone demonstrate, lawful jurisdiction of the United States and NRC authority over the territory and lands upon which CBR seeks to conduct its activities.

The CBR commercial uranium milling facility is located on lands belonging to the sovereign Očhéthi Šakówiŋ and its people including the Oglala Sioux Tribe as part of the "Unceded" territory secured by treaty, and not within the territory or on lands of the United States or any of its subdivisions by which the NRC may exercise any lawful jurisdiction or authority without the consent of the Očhéthi Šakówiŋ and Tribe. The natural resources that CBR seeks a license from the NRC to exploit, degrade, and destroy for private profit also belong to the Očhéthi Šakówiŋ and its people. It is the lawful possessor of sovereign jurisdiction and authority, to the exclusion of the United States, over the territory upon which both the land and its natural resources lie and is the rightful caretaker of that land and its natural resources, including its minerals and its surface and ground water and air. The United States is the *de facto* wrongful colonial occupier of and *de facto* wrongful exerciser of colonial authority over that Unceded Tribal territory and lacks lawful, *de jure*, jurisdiction or authority over the activities that occur within that Territory or over the land and its natural resources found within.

By Article V of the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749, with the Očhéthi Šakówiŋ (which included the Oglala Lakȟóta), the United States recognized and acknowledged the territory of the Očhéthi Šakówiŋ and the Tribe, including the territory containing the lands and minerals at issue here. Then, by Article XVI of the Fort Laramie Treaty of 1868, 15 Stat. 635, with the United States, the Očhéthi Šakówiŋ again secured against the United States its territory and lands, including the "Unceded Territory" containing the lands and minerals being under CBR's application for the issuance of a license by the NRC for the United States. By the Treaty of 1868, Articles II and XVI, the United States "solemnly" agreed that "no persons" would be authorized without the prior consent of the Tribe "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article ...." Neither treaty provided for any right of abrogation in any party to the treaty. Rather, Article XII of the Treaty of 1868 expressly provided and agreed that no further cession of any Sioux territory or lands could be made by the Očhéthi Šakówiŋ "unless [by treaty] executed by at least three fourths of all the adult male Indians, occupying or interested in same."

Following the discovery of gold in the sacred Paha Sapa, the Black Hills, in 1874 by a large US military expedition led by General George Custer which entered Očhéthi Šakówiŋ territory under false pretext, the US government abandoned its treaty obligation to preserve the integrity of the Očhéthi Šakówiŋ territory from trespassing prospectors and settlers. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 376-79 (1980). In 1876, the US government declared that people from the Očhéthi Šakówiŋ found lawfully within the "unceded" Očhéthi Šakówiŋ territory in Nebraska to be "hostiles" and engaged in a war campaign against them. *Id.*, 448 U.S. at 379. The next year after unsuccessful attempts to negotiate the cession of the Black Hills by the Sioux, the United States in unlawful exercise of colonial authority attempted a wrongful taking through the ratification of a fraudulent treaty that opened up the Black Hills and the Sioux territory and lands in Nebraska, including the Article XVI territory and lands, for settlement. Act of February 28, 1877, 19 Stat. 254; *Sioux Nation*, 448 U.S. at 381-84, 424.

After over a century of challenges by the Očhéthi Šakówiŋ to this unlawful attempted abrogation of the Treaty of 1868, the United States Supreme Court in 1980 per Justice Blackmun finally considered the challenge and agreed the 1877 treaty was fraudulent, but held that the Congressional ratification of the fraudulent treaty was an "effective" – not express – abrogation of the 1868 Treaty. *Sioux Nation*, 448 U.S. at 382-83. The Court then ruled that the Act of 1877 was a "taking" by the United States under its colonial "plenary" power over Indian nations and awarded the Očhéthi Šakówiŋ purported "just compensation" for the theft of its ancestral, treaty protected, territory, lands and natural resources. *Id.*, 448 U.S. at 410-12, 423-24 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) on the exercise of plenary power). However, the Očhéthi Šakówiŋ, and particularly the Oglala Sioux, have not given up its claim to its treaty lands and territory, rejected and refused to accept the award and demanded, and continues to demand, the relinquishment of their territory and lands from colonial rule and occupation by the United States. *See, e.g., Hearing Before the Select Committee on Indian Affairs, United States Senate*, 99TH Cong., 2d Sess., S. 1453 (Sioux Nation Black Hills Act) http://www.gpo.gov/fdsys/pkg/CHRG-99shrg63488/pdf/CHRG-99shrg63488.pdf; *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps. of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009); Lazarus, Edward. Black Hills/White Justice: The Sioux Nation versus the United States, 1775 to the Present (1991).

Parsing the language of Justice Blackmun in *Sioux Nation*, the Act of 1877 was not a proper abrogation of the 1868 Treaty but, rather, was an exercise of the assumed colonial, plenary, power of Congress over Indian nations and peoples that "effectively" abrogated the Treaty, in essence an "implied" abrogation. *See, e.g., Horner v. United States*, 143 U.S. 570 (1892); *Whitney v. Robertson*, 124 U.S. 190 (1888); G. Hackworth, Digest of International Law, 185-98 (1943). The colonial power's own law, what is known as "federal Indian law", on abrogation of Indian treaty rights requires a "clear showing of legislative intent" "not lightly implied." *United States v. Santa Fe Pac. RR Co.*, 314 U.S. 339, 353 (1941); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Generally, this requires an express statement of Congress in order to abrogate treaty rights. *Leavenworth, Lawrence, & Galveston RR Co. v. United States*, 92 U.S. 733, 741-42 (1876); *Frost v. Wenie*, 157 U.S. 46, 60 (1895); *also, Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); C.F. Wilkinson & J.M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth – How Long a Time is That*, 63 Cal.L.Rev. 601 (May 1975).

However, treaties between sovereign nations are not governed by principles of domestic law, let alone that of a colonial power, but by international law and grounded on the fundamental principle of *pacta sunt servanda*, that treaties must be obeyed. *See*, Vienna Convention on the Law of Treaties ("Vienna Convention"), art. 26 (May 23, 1969), 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). This principle has been recently restated by the United State as a signatory[1] in regards to treaties with indigenous nations in the United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP"), art. 37, sec. 1 (September 13, 2007) ("Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements, and other constructive arrangements concluded with States or their successors and to have States honour and respect

[1] 78 Fed.Reg. 26384 (May 6, 2013).

such treaties, agreements and other constructive arrangements."). Even when provisions of a treaty allow a party to unilaterally withdraw from the agreement, the withdrawing state is not released from obligations that occurred, nor excused from violations that existed prior to the date that its withdrawal took effect. *See*, Vienna Convention, art. 70(1), 1155 U.N.T.S. at 349.

Unilateral withdrawal as here from treaties that do not contain exit provisions may be a breach of the treaty, particularly where treaty provisions expressly foreclose unilateral withdrawal by the parties – "absolute and undisturbed use and occupation," "no persons ...shall *ever* be permitted to pass over, settle upon, or reside in the territory described in this article" (1868 Treaty, art. II) (emphasis supplied). Vienna Convention, art. 56 (an agreement "which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal ...."); *see also, e.g.*, U.N. Human Rights Commission, 53rd Sess., General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 26(61), at 102 ¶s 1-5, U.N. Doc. A/53/40 (1998).[2] "[T]reaties with the Indians must be interpreted as they would have understood them." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Clearly, the Očhéthi Šakówiŋ did not understand the provisions of the 1868 Treaty as granting the United States any right to unilaterally abrogate the Treaty. Furthermore, abrogation of the 1868 Treaty whether express or implied would merely place the parties, the Očhéthi Šakówiŋ and the United States, in the position they were in prior to the treaty under the Fort Laramie Treaty of 1851[3]. For those reasons, the abrogation of the 1868 Treaty would not result in any taking of any territory or lands of the Očhéthi Šakówiŋ.

Therefore, as held by Judge Blackmun, any taking of the territory and lands at issue would have had to occur pursuant to the "plenary" power unilaterally assumed under in the subsequent *Lone Wolf* decision by the colonial occupier, the United States, over the territory, lands, and affairs of the sovereign Očhéthi Šakówiŋ and its people. *Sioux Nation*, 448 U.S. at 410-12, 423-24. There lies the problem. Neither the sovereign Očhéthi Šakówiŋ nor the sovereign Oglala Sioux Tribe nor the Oglala peoples, the Lakȟóta, have ever accepted or acceded to the colonial rule and plenary power of the United States over them as a matter of law, and do not now. They recognize the *de facto* exercise of plenary power over them by the United States as an occupying colonial state, but that does not and has never made that brute exercise of colonial power lawful or provide any basis for the unlawful taking of any territory or jurisdiction or lands or natural resources of the Očhéthi Šakówiŋ, the Oglala Sioux Tribe, or the Lakȟóta Oyate.

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[2] Abrogation of a treaty by a state under the doctrine of changed circumstances, *rebus sic stantibus*, requires a fundamental change in circumstances that occurred since the making of the treaty and which could not have been foresee at the time. Vienna Convention, art. 62. Further, the doctrine requires that the abrogating party have approached the other party in a good faith effort to settle the problem. Vienna Convention, arts. 65, 66. *See also, International Law Commission Report* (1966), 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

[3] The abrogation of the 1868 Treaty would withdraw the provision under Article XVII abrogating and annulling all prior treaties and agreements.

Even opinions and rulings of the Supreme Court, acts of Congress, and exercise of executive colonial authority by the Executive Branch and the agencies of the United States as a matter of international law are not binding upon the Očhéthi Šakówiŋ or the Oglala Sioux Tribe, any more than they are binding upon Mexico or Canada unless consented to by the other sovereign. They are exercises of colonial rule by a dominant nation over another nation which was illegal under the Law of Nations in 1823, 1831, 1832, 1851, 1868, and 1877[4] as it has remained to be illegal – and condemned - under modern international law.

In 1960, almost 60 years ago and during a period of struggles liberation from colonial rule by peoples across the World, the United Nations General Assembly (including the United States) adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Gen. Ass. Res. 1514 (December 14, 1960), by which the international community of nations condemned colonialism as a gross violation of the Charter of the United Nations and the collective "inalienable" fundamental human rights[5] of all peoples "to complete freedom, the exercise of their sovereignty and the integrity of their national territory," and further absolutely and without any reservations condemned the continuation of colonialism "*in all its forms.*" The United Nations General Assembly therein declared further that "[a]ll peoples have an [equal] right to self-determination" and that "[i]nadequacy of political, economic, social or educational preparedness should neve serve as a pretext for [a colonial power] delaying independence [of any peoples under colonial rule]." The General Assembly then instructed its colonial power members, including the United States, to take "immediate steps" in all territories subject to colonial rule which have not yet attained independence, "to transfer all powers to the peoples of

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[4] *See, e.g.*, Emer de Vattel, The Law of Nations (1758) (Liberty Fund, Inc. reprint, 2008), particularly Book I, Chapter XII (on treaties); Book II, Chapter IV (sovereignty and independence of nations), Chapter VII, Section 93 (violation of territory), Chapter XIII (dissolution of treaties, violation of treaties), Chapter XV (faith of treaties); and Book III, Chapter IX (war, things belonging to the enemy), Chapter XI (unjust war), Chapter XIII (acquisitions by war and conquest). The application of principles of international law, specifically de Vattel and The Law of Nations, to the relationship between Native nations and the United States and to the treaties between them, were acknowledged and then purposefully and racially distorted by Chief Justice John Marshall in the Cherokee Nation decisions that created the colonial legal principles known as "federal Indian law," including the doctrines of discovery (colonial ownership of indigenous lands and territory), and of plenary power and "trust" authority over the indigenous nations peoples found on the lands and territories they colonized. *See, Johnson v. M'Intosh*, 21 U.S. 543, 568 notes h and I, 571, note k (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 53 (1831); *Worcester v. Georgia*, 31 U.S. 515, 520, 561 (1832).

[5] "Inalienable" or "fundamental" human rights are often referred to as "*jus cogens*" or "preemptory" rights under international law, essentially fundamental, existential, natural, rights that do not require a treaty to establish them and rights which are so fundamental that they cannot be compromised or derogated by treaties or agreements of nations. *See*, Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 Eur.J.Int'l.L. 42 (1991). By Resolution 1514, the UN General Assembly acknowledged the right of a peoples to "complete freedom" including the "exercise of their sovereignty" and "the integrity of their national territory" as *jus cogens* rights. *Accord.*, Anaya, James, Indigenous Peoples in International Law (Oxford / 2004), 97 (the collective human right of all peoples to self-determination).

those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order for them to enjoy complete independence and freedom."

In 1965, the United Nations adopted the International Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965). United Nations, Treaty Series, vol. 660, p. 195 ("ICERD"). The ICERD was signed by the United States signed in 1966 and ratified by Congress in 1994, becoming part of the supreme *domestic* law of the United States. US Constitution, art. VI, cl. 2. Even if the United States assumes the position that the treaty has not yet been fully implemented within domestic law, under the international law of treaties, a signatory state cannot act to undermine a treaty it has signed but not fully executed. The ICERD again fully condemned colonialism "and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist," and specifically noted UN Resolution 1514 as a premise for the treaty. ICERD, Preamble, ¶3. That condemnation of colonialism by the international community in the UN Resolution and the ICERD was the basis for the rejection of the federal (colonial) Indian law's doctrine of discovery and discriminatory treatment of indigenous peoples by the Australian Supreme Court in its *Mabo I* and *II* decisions[6].

The claim by the United States of lawfulness in the exercise of plenary power over the Očhéthi Šakówiŋ is a legal fiction constructed to "legalize" an illegal taking of Očhéthi Šakówiŋ territory and lands - no less a fiction than the "natural law" of Nazi Germany, Lebensraum, modeled after the prior exercise of colonial plenary power by United States over indigenous nations and peoples, that purportedly justified and legalized the German invasion and the occupying and taking of the territories and lands of Poland and other "less civilized" nations of eastern Europe and the Nuremburg Laws that "legalized" the removal and killing, the genocide, of "lesser" peoples in Europe, and, previously, indigenous peoples in Africa. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz.St.L.J. 113, 184-86 (2002) ("Clinton"); Shelley Baranowski, Nazi Empire: German Colonization & Imperialism from Bismarck to Hitler (2011), 141; Olusoga, David and Erichsen, Casper, The Kaiser's Holocaust: Germany's Forgotten Genocide (Farber / 2010), 86-87, 108-109.

Any and all power of the United States in its relations with other sovereign nations is and always has been constrained by international law, the "law of nations," and any and all exercise of power of the United States government additionally arises from and is subject to its own Constitution. *See, M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The United States Constitution fails to provide any support for the colonialist exercise of plenary power by the United States over sovereign indigenous nations, including the taking of indigenous territory, lands, and resources and the removal of indigenous peoples from their ancestral, treaty secured, territory and lands. Clinton, 169-205; Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Ind. L. Rev. 57 (1991); *also,* Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 William & Mitchell L. Rev. 538, 564-78 (2013); Note,

[6] *Mabo v. Queensland (No. 1)*, 166 LCR 186, HCA 69 (1988); *Mabo v. Queensland (No. II)*, 175 CLR 1, HCA 23 (1992).

Congressional Abrogation of Indian Treaties: Reevaluation and Reform, 98 Yale L.J. 793, 806-08 (Feb. 1989).

Most recently, the international community with near unanimity has acknowledge in Article 19 of the UN DRIP, executed by the United States, that "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." Article 10 provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and ...where possible, with the option of return." The requirement of "free, prior and informed consent" of the affected indigenous peoples before the State's adoption or implementation of legislative or administrative measures is an express rejection of the exercise of plenary power by a state over indigenous peoples. See also, ILO Convention 169, art. 6, sec. 2 and art. 26, sec. 2 (1989). A peoples' "right of consent" clearly arises out of their collective human rights to self-determination, to territorial integrity, and to property, including both the land and resources found within their territorial boundaries.[7]

Furthermore, Article 26, Section 1 of the UN DRIP executed by the United States provides that: "Indigenous peoples have a right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26, Section 2 provides: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." Article 26, Section 3 further provides: "States *shall* give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." (emphasis added)

In another matter very similar to the one at bar, two members of the Western Shoshone tribe, sisters Mary and Carrie Dann, challenged the authority of the federal government over ancestral tribal lands, secured by treaty, which were being considered for gold mining. The Danns and other Western Shoshone contended that the United States had unlawfully abrogated the treaty and taken the tribal lands which had been trespassed and encroached upon by settlers for which an award of compensation had been issued by the federal government. *United States v. Dann*, 470 U.S. 39 (1985); *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991). Like the Očhéthi Šakówiŋ, the Western Shoshone rejected the award, challenged the exercise of plenary power by the United States in taking the lands, and demanded the return of the tribal lands. *Id.* The courts held that federal Indian law did not provide a remedy for the return of lands that had been wrongfully taken from the Western Shoshone and that the unaccepted award of compensation had mooted the demand for the return of the land. *Id.*

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[7] For example, the Inter-American Court on Human Rights enforced the "right of consent" in regards to the territory, lands, and natural resources of indigenous peoples in Suriname. *Saramaka People v. Suriname*, IACHR (Nov. 28, 2007), Series C No. 72, ¶s 130, 131, 133 – 192, 194, Relief ¶s 5, 8 (*citing*, Article 32 of the UN DRIP and ILO Convention 169).

The Dann sisters then submitted a petition with the Inter-American Commission on Human Rights (IACHR), the human rights tribunal of the regional international body of the Americas, the Organization of American States, of which the United States is a member, requesting a determination of whether federal Indian law deprived them and the Western Shoshone of various human rights, including the indigenous peoples collective right to property, the right to equality under the law, and the right to an effective remedy. The right to equality was violated in that indigenous peoples were the only peoples or race being collectively denied the right to property and a remedy to protect that right. In late 2002, the IACHR issued its landmark ruling concluding that United States failed under international law to ensure the Dann's collective human right to property and equality under the law[8] by denying them a remedy that included the return of the land wrongfully taken from the Western Shoshone peoples. *Dann v. United States*, Case 11.140, Report No. 75/02, Doc. 5. 1 at 860 (2002), ¶s 171 and 172. The IACHR then recommended that the United States revised its domestic laws, federal Indian law, to provide an effective remedy that includes the return of wrongfully taken indigenous property. *Id.*, at ¶173, Recommendations 1 and 2.

Following the IACHR *Dann* decision, the Western Shoshone National Council submitted a petition to the United Nations Committee on the Elimination of Racial Discrimination ("Committee") requesting the issuance of a warning of human rights violations by the United States and urgent action recommendations to correct those violations. The Committee is the international body tasked with obtaining state compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965), United Nations, Treaty Series, vol. 660, p. 195 ("ICERD"), which the United States has signed and ratified. The Committee granted the petition, found that there was "credible information alleging that the Western Shoshone indigenous peoples are being denied their traditional rights to land," expressed its concern by the lack of action by the United States, expressed its concern regarding the position of the United States "that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment," and noted that the position asserted by the United States was "made on the basis of processes [under federal Indian law], which did not comply with contemporary international human rights norms, principles, and standards that govern determination of indigenous property interests [citing the IACHR *Dann* decision]." *Id.* at ¶s 4, 5, and 6. The Committee then opined that the United States had violated its obligation under the ICERD to guarantee the Western Shoshone peoples' collective equality before the law without discrimination based on race, colour, or national or ethnic origin. *Id.* at ¶s 7 and 8. The Committee drew the attention of the United States to the Committee's General Recommendation 23 (1997) on the rights of indigenous peoples, in particular their right to own, develop, control and use their communal lands, territories and resources (*Id.* at ¶ 9) and urged the United States to: "a) Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers;" and "b) Desist from all activities planned and / or conducted on the ancestral lands of Western Shoshone or in relation to their

[8] In *Mabo v. Queensland (No. 1)*, 166 LCR 186, HCA 69 (1988), for example, the High Court of Australia applied the International Convention on the Elimination of All Forms of Racial Discrimination in voiding a domestic law that would have denied the Torres Strait indigenous peoples a collective right to property equal to that of non-indigenous Australians.

natural resources, which are being carried out without consultation and despite protests of the Western Shoshone peoples...." (*Id.* at ¶ 10).

The very same rule applies here to the protection of the collective human right of the Očhéthi Šakówiŋ, the Oglala Sioux Tribe, and its people to their sovereignty and to their ancestral, treaty-secured, lands and territory upon which the current and proposed CBR activities are taking place and are proposed to take place under license from the colonial authority, the United States.

As matters of both domestic and international law, there was no lawful exercise of plenary power by the United States over the Očhéthi Šakówiŋ and its peoples through the Act of 1877, or through the US Supreme Court's exercise of colonial rule in its unilateral abrogation of the 1868 Ft. Laramie Treaty in the *Sioux Nation* decision, and there was no lawful taking of, occupation of, or colonial rule over, the territory or lands or natural resources of the Očhéthi Šakówiŋ or the Oglala Sioux Tribe, including the territory, lands, and natural resources at issue here. When an exercise of colonial rule is challenged by the raising of settled principles of international law, binding upon the United States and its agencies, including the US NRC and the US EPA, it is not proper to cite to a colonial court's decision, such as the *Sioux Nation* decision, applying condemned doctrines of colonial law rather than international law. That is a wholly circular response asserting that the law of colonial rule justifies the exercise of colonial rule over an occupied nation and peoples – that might makes right. It is a shameful avoidance not only of the rule of law but also of the continuing and heinous violations of the fundamental collective human rights, *jus cogens* rights, and the sovereignty and territorial integrity, lands and natural resources and water resources, and the spirituality, culture, and even the survival, of other nations and peoples for the private gain of a toxic mining enterprise. The Environmental Assessment fails to even discuss let alone demonstrate lawful jurisdiction and authority of the United States or its NRC under international law and the law of treaties to issue any license to CBR for any activities upon this territory and land without the prior consent of the Očhéthi Šakówiŋ and the Oglala Sioux Tribe.

Failure to Meet Applicable Legal Requirements Regarding Protection of Historical and Cultural Resources, and Failure to Involve or Consult the Oglala Sioux Tribe as Required by Federal Law and International Law

The Draft EA fails to meet the requirements of NEPA, the NHPA, and 40 C.F.R. §§ 51.10, 51.70 and 51.71, along with the NRC, ACHP, and CEQ regulations because it lacks an adequate description of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources.

As a result, the Draft EA fails to comply with Section 51.60 because its analyses are not adequate, accurate and complete in all material respects concerning archaeological sites and materials within the project area. No specific survey was performed for this license expansion in order to demonstrate that archaeological sites within the project area are properly identified, evaluated and protected and to show that it has submitted a proper analytic discussion under Sections 51.45 and 51.60 and the NRC Staff relied on old survey that were done in 1982 and 1987. Not all interested tribes were 'meaningfully' consulted, particularly including the Tribe, and the prior, informed consent of the Tribe to proceed with CBR's activities was not obtained.

Proper baseline information is lacking in the Draft EA and it fails to demonstrate adequate confinement and protection of cultural resources.

10 C.F.R. § 51.71(d) and NEPA require that the Draft EA include an analysis of all environmental impacts of a proposed action, including cultural impacts. 10 C.F.R. § 51.70(a) places an affirmative duty on NRC Staff to conduct all NEPA analysis in conjunction with other surveys or studies required under federal law. This includes necessary surveys required under NEPA and the NHPA.

The Draft EA states at Section 3.6.3 describes several historic and cultural property field surveys of parts of the Marsland expansion and surrounding area apparently conducted in 2005, 2010, and 2011 under Section 106 of the National Historic Preservation Act (NHPA) to identify "historic and cultural properties." According to the Draft EA, Section 3.6.2.2 and Section 3.6.2.3, the NRC Staff was aware that the MEA lies within the ancestral territory of the Očhéthi Šakówiŋ specifically occupied and used by the Oglala Lakȟóta Oyate through at least 1873 when the Red Cloud Agency was established just west of what is now Crawford, Nebraska, through the Sioux Wars of 1876-1877, and through 1887 when that area of the Unceded Lands was unlawfully taken by Congress from the Očhéthi Šakówiŋ and opened to settler colonialists. Although it is absent without explanation from the Draft EA while contained in the Final EA issued earlier by the NRC Staff for the CBR License Renewal Application, this general area contains an important vision quest site and is traditionally used by the Očhéthi Šakówiŋ to gather medicinal and ceremonial herbs and plants, Crow Butte. *See*, License Renewal (LR) Final EA, Section 3.9.8 (ML14288A517).

It does not appear from the Draft EA that any of these surveys were conducted by, under the supervision of, in the presence of, or even under the direct consultation with any qualified Native persons, let alone qualified members of the Očhéthi Šakówiŋ or the Oglala Lakȟóta Oyate or the Oglala Lakota Tribe. Among the applicable requirements are those under the National Historic Preservation Act and related Executive Orders which required to fully involve the Tribe in all aspects of decision-making affecting Tribal interests such as those directly impacted by the project, including the license expansion. See, e.g., Executive Order, 13175 and 36 C.F.R. 800.2(c)(2)(ii)(A). These mandates require NRC to consult with Tribe as early as possible in the decision-making process. Here, as discussed further below, the NRC has not meaningfully engaged in the required consultation process. As indigenous archaeologist, Dr. Louis Redmond, opines below, the mere fact that the MEA field surveys failed to located even a single indigenous historic or cultural property (see, Section 3.6.3.1 (Table 3-10) and Section 3.6.3.3 (Table 3-11)) given the 12,000-year occupation and use of that area by the Očhéthi Šakówiŋ, the Oglala Lakȟóta Oyate, and other indigenous peoples (Section 3.6.2.1) strongly evidences the insufficiencies of these NHPA Section 106 surveys.

> I do find several problems with the lack of any Native American properties located during the survey.
>
> First, I worked in this general area from 1992 through the Fall of 1995 as the Forest Archeologist for the Nebraska National Forest. It was my experience that whenever we surveyed areas near or bordering on water resources, ponds, creeks, et cetera, we would almost invariably find

> prehistoric camp sites and related process sites. Throughout this proposed project area, there are a number of both permanent and intermittent water resources of all kinds, including creeks, springs and natural ponds.

Statement of Dr. Louis Redmond, January 28, 2013 (ML13029A820).

In addition, Dr. Redmond further opines that the lack of subsurface testing when large scale ground disturbances are being contemplated is a violation of field survey standards and protocols:

> [T]his project will eventually cause significant ground disturbance, and yet there is no evidence that any type of subsurface testing process for any level of cultural materials took place. It would seem that some form of subsurface testing to at least below the alluvium level be performed over at least the area where most of the surface impacts will occur. I would suggest that this type of processing be instituted on at least the higher elevations near water resources where the alluvium layer would be shallower due to natural erosional processes.

Id.

In his Opinion Letter, Dr. Redmond suggests that the MEA survey was performed during winter months when the ground was likely covered by snow and ice thereby concealing possible finds. It seems clear that CBR's TCP surveys would benefit from the involvement of tribal officials who would be able to point out common sense like the fact that it is hard to locate Native American properties when the ground is frozen and snow-covered as it often is in November and February when the Marsland TCP survey was conducted.

Dr. Redmond opines:

> [T]he survey that was performed in this area was over approximately 4,500 acres, which was surveyed between November 2010 and February 2011. It was also my experience in working in this area that during that time of the year, snow and ice covered most of the ground surface, at least greater than 85%. **My problem with this scenario is that it would be relatively impossible to locate 99% of prehistoric/Native American sites without a much higher level of ground surface observation, i.e., greater than 60-75%, preferably greater than 90%.** As stated in the synopsis of the cultural report, this area of the Nebraska Panhandle has not been subjected to even minor investigation. **Due to this lack of research, it would appear intuitively evident that an investigation with little or no ground surface visibility would be insufficient to state that no Native American/prehistoric materials were present.**

Id.

As Dr. Redmond states, there is scant if any research or literature related to Native American sites in the subject area of the Nebraska Panhandle and due to this lack of research and

the investigation during a time when there is little or no ground surface visibility, the lack of a finding of TCPs should not be interpreted as grounds for a conclusion that no such TCPs exist in the area. If the survey were done by CBR in the summer and complied with standard protocols for such surveys, then Tribe's concerns would be less. However, it appears that CBR intentionally scheduled the Marsland TCP survey for a time when it would be highly unlikely to find TCPs due to the weather and ground conditions.

The Draft EA also distinguishes between an NHPA Section 106 "field survey" (Draft EA, Section 3.6.3) and an "ethnographic filed study" for "traditional cultural properties" (Draft EA, Sections 3.6.5.1 and Section 3.6.5.2). The Draft EA also states at Section 3.6.5 that the NRC Staff was well aware of the potential for this area to have significant religious or cultural significance which "may not be represented in archaeological or historic contexts." EA, Section 3.6.5.1. The Draft EA, for example, refers to an ethnographic filed study conduct by Sebastian LeBeau, a member of the Cheyenne River Sioux Tribe of an area 25 miles west of the Marsland Expansion Area which "indicates there is a potential for Lakota places of religious or cultural significance to exist in this part of western Nebraska. While LeBeau's investigation ...was not a complete survey ...or a systematic analysis [of the site], it did point out some possibility for the existence of places of Lakota spiritual value, offering sites, and sites used for gathering of natural resources to be present in the vicinity of the MEA." Draft EA, Section 3.6.5.1 and 3.6.5.2.

While the OST was invited to conduct a TCP survey at its own expense, no offer was made to involve OST tribal representatives and elders in the TCP surveys being conducted at CBR's expense. The Draft EA describes a "spiritual walk" by representatives of the Crow Nation (located approximately 500 miles from the MEA) and the Santee Sioux Nation (located approximately 400 miles from the MEA) during the winter of 2012 and although neither of their tribes had the greatest history of association with the area, that belongs to the Oglala Sioux Tribe (reservation located about 50 miles from the MEA), they identified "12 potential places of religious or cultural significance." Draft EA, Section 3.6.5.2 However, these identified "places of religious or cultural significance" were summarily dismissed as they were not "potentially eligible for listing on the NRHP." *Id.* In other words, while purporting to consider "TCP"s that "may not be represented in archaeological or historic contexts" (Draft EA, Section 3.6.5.1), the NRC Staff the proceed to dismiss those very properties as not falling within the more narrow properties subject to protection under the NHPA. These "intangible" TCPs are specifically what the NRC Board held in the previous License Renewal proceeding had to be considered by the NRC Staff, and was not, under the broader NEPA "hard look" requirement. *In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, 83 N.R.C. 340, 2016 WL 8260624 (ASLBP No. 08-867-02-OLA-BD01) (May 26, 2016) ("*Matter of Crow Butte*, May 26, 2016") at 402-03. That alone is a violation of NEPA and renders the Draft EA insufficient in its consideration of the spiritual and cultural significance of the MEA to the Očhéthi Šakówiŋ, the Oglala Lakȟóta Oyate, and the Oglala Sioux Tribe, among other interested indigenous peoples and nations with ancestral ties to the area.

On specific consultation, the Draft EA states merely that it "formally initiated the Section 106 consultation process for the MEA by contacting the 21 Tribal governments by letters dated September 5, 2012", "mailed a letter to each of the consulting Native American Tribes on October 31, 2012, offering access to all of the CBR project areas," "sent a letter to all consulting

Native American Tribes on January 3, 2013, to update them on the ongoing consultation activities," and "sent an unredacted copy of the Tribal field survey report" to each of the consulting Native American Tribes, on April 2, 2013. Draft EA, Section 3.6.4 and Section 3.6.5.2. The Draft EA notes that several of the "consulting Tribes" "responded to this report disagreeing with the findings." Section 3.6.5.2 (Cheyenne River Sioux Tribe, Yankton Sioux Tribe, Standing Rock Sioux Tribe). There is no indication in the Draft EA whether or how the NRC Staff responded to or followed up, if at all, to these formal disagreements from a number of interested nations of the Očhéthi Šakówiŋ. With the exception of the previously mentioned "spiritual walk" by the Crow Nation and the Santee Sioux Nation (Section 3.6.5.2), the EA provides no further detail of any other response or participation by any of the 21 Tribes to whom the letters had been sent.

The Section 106 and TCPs that are found within the MEA relate most closely to *Oglala* and *Lakȟóta* history, and nobody or entity is more qualified to judge their existence or importance that the Oglala Lakȟóta Oyate (people) themselves - which is precisely why consultation is required and those determinations are not left to the federal agency or company proposing action. This is very difficult to explain to tribal members who are infused with the wisdom of nature and common sense and often fail to comprehend the ways of the mining company and the NRC Staff.

The National Environmental Protection Act, NEPA, guarantees a right of 'meaningful' consultation to Indian tribes when there is major federal action. NEPA mandates that the government "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice." 42 USC § 4331(b). NEPA then triggers the National Historic Preservation Act (NHPA), 16 U.S.C.S. § 470f., Native American Graves Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq. and the Archaeological Resources Protection Act, 16 U.S.C. 4700 *et seq.* Federal agencies are required to consult with federally recognized Indian tribes that may attach religious or cultural significance to the project area, even if the project area is not within its reservation under Section 106 of the NHPA. 36 C.F.R. 800.4(f)(2).The federal agency is further required to consult with a tribe's Tribal Historic Preservation Officer (THPO) if there is one, and a tribal representative if not.

The Oglala Sioux Tribe is a federally recognized tribe, entitled to all the rights under federal law that such tribes are entitled to, including consultation under Section 106 of NHPA, as well as the obligations owed to it from its assumed trustee, the federal government. Furthermore, the CBR area is within the 1851 Treaty and 1868 Treaty areas, which is recognized as the aboriginal land of the Tribe, and therefore the Tribe ascribes cultural and religious significance to many sites in that area. The Tribe asked that tribal representatives be involved in the surveys being conducted by CBR and being used by the NRC Staff but it was refused and instead it was offered a chance to conduct its own TCP surveys at its own expense. The NRC cannot make that determination without 'meaningful' consultation with the Tribe and certainly not over the objections of the Tribe (and in rejection of the Tribe's reasonable good faith request to be involved in the CBR surveys) and yet it has done so in this case as reflected by the issuance of the Draft EA in its current form.

This whole process of Section 106 "consultation" was fundamentally flawed, did not amount to a good faith consultation, and failed to satisfy NHPA let alone the requirements for an adequate consultation under NEPA. The Marsland Expansion consultation was conducted jointly with the NRC Staff's consultations on the CBR License Renewal application and with an application by Powertech for an *in situ* uranium mining license in the Black Hills of South Dakota. This joint consultation procedure and adequacy was litigated extensively in both collateral proceedings which produced decisions by separate NRC Boards. *See*, LR Decision, May 26, 2016; *In the Matter of Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, 2015 WL 7444635 (ASLBP No. 10-898-02-MLA-BD01) (April 30, 2015) ("*Powertech*, Board Decision"). The *Powertech* decision was also affirmed by the Commission on appeal. *In the Matter of Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, 84 N.R.C. 219, 2016 WL 9460000 (CLI-16-20) (December 23, 2016) ("*Powertech*, Commission Decision"). CBR, the NRC Staff, the Oglala Sioux Tribe, were all parties to the litigation over the renewal of the license for the CBR facility on a few miles from the MEA and the very same issues of the adequacy of the Section 106 surveys and consultation for the area of CBR's activities, including the adequacy of the Section 106 survey of the MEA, was litigated.

The 'consultation' process as one involving a single large collective meeting involving the NRC, several tribes and representatives of more than one uranium company (CBR and Powertech-Dewey Burdock) in June 2011. There was never a meeting with the Oglala Sioux Tribe solely devoted to the CBR Marsland expansion. Further, although the Tribe was invited to do its own TCP survey at its own cost, it was never involved in the surveys that were being conducted with regard to CBR Marsland Expansion Area, nor the Section 106 surveys on which the Draft EA relies. Further, as previously mentioned, the Cheyenne River Sioux Tribe (ML13123A089 / ML13157A297); Yankton Sioux Tribe (ML13126A309 / ML13157A221); and Standing Rock Sioux Tribe (ML13126A327 / ML13157A263), each objected to the findings dismissing the sites identified by the Crow Nation and the Santee Nation as having religious or cultural significance because they did not qualify for NRHP listing under the NHPA. The Standing Rock Sioux Tribe stated in the response at ML13126A327 that it disagreed with the interpretations in the Santee Sioux TCP Report as to the stone circles. There is no reply or responsive content to the letter from Standing Rock Sioux Tribe.

Further, Dr. Redmond states that the number and identity of the tribes having an interest in the area are greater in number than is reflected in the Marsland TCP survey:

> [A]lthough it is true that the primary tribal use of this area was by the Sioux (sic) and Cheyenne, a number of tribes utilized the Nebraska Panhandle area. According to just the treaties from this area, a number of tribes are not noted for this cultural review. One of the most encompassing of these treaties is the 1851 Fort Laramie Treaty involving the Sioux or Dahcotah (sic), Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras. The People listed as "Sioux or Dahcotah" are not easily defined, but include the Lakota Nations of the Sicangu, Brule, Oglala, Minnecoujou, Hunkpapa, Izipaco, Sihasapa, and Ooinunpa nations. Added to these are the Sans Arcs, Santee and Yanktons who are Dakota speakers. The Mandans and Arrickara noted in the said treaty would also

> include the Hidatsa peoples of the Three Affiliated Nations. As to the Cheyenne defined in the 1851 Treaty, this would indicate both the current Northern and Southern Cheyenne Nations since the division is an artificial artifact of the Government reservation system. In addition, although not listed in this treaty, the Pawnee would also have utilized this area, at least the northern Pawnee or Skidi.

Redmond Opinion Letter, January 28, 2013.

Thus, Dr. Redmond lists 21 Indian tribes[9] that should have been consulted which is far more than is described in the Draft EA; which means that there are tribes that have not been properly consulted as part of the Section 106 process in violation of NEPA and NHPA. It is significant that the NRC Staff has had Dr. Redmond's Opinion Letter since 2013, for 5 years, and over that extended period has apparently heeded little if any of it during the preparation of the Draft EA for the Marsland Expansion Area.

The NRC Staff has not carried out its agency responsibilities in a manner that recognizes and respects the government-to-government relationship. Merely sending letters to a main tribal address is not enough. The federal courts have addressed the strict mandates of the National Historic Preservation Act:

> Under the NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8[c], 800.9(c). The [federal agency] must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation ("Council").

Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 805 (9th Cir. 1999). See also 36 CFR § 800.8(c)(1)(v)(agency must "[d]evelop in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the undertaking on historic properties and describe them in the [NEPA document].")

NRC Staff interpretations of these requirements are not entitled to deference. The Advisory Council on Historic Preservation ("ACHP"), the independent federal agency created by Congress to implement and enforce the NHPA, has exclusive authority to determine the methods for compliance with the NHPA's requirements. See *National Center for Preservation Law v.*

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[9] Sioux or Dahcotah (including the Lakȟóta Nations of the Sicangu, Brule, Oglala, Minnecoujou, Hunkpapa, Izipaco, Sihasapa, Ooinunpa, the Sans Arcs, Santee, Yanktons, the Mandans, the Arrickara, and the Hidatsa peoples of the Three Affiliated Nations); Cheyennes (including both the current Northern and Southern Cheyenne Nations), Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and the Pawnee (northern Pawnee or Skidi).

Landrieu, 496 F. Supp. 716, 742 (D.S.C.), *aff'd per curiam,* 635 F.2d 324 (4th Cir. 1980). The ACHP's regulations "govern the implementation of Section 106," not only for the Council itself, but for all other federal agencies. Id. See *National Trust for Historic Preservation v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

NHPA § 106 ("Section 106") requires federal agencies, prior to approving any "undertaking," such as this project, to "take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470(f). Section 106 applies to properties already listed in the National Register, as well as those properties that may be eligible for listing. See *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995). Section 106 provides a mechanism by which governmental agencies may play an important role in "preserving, restoring, and maintaining the historic and cultural foundations of the nation." 16 U.S.C. § 470.

If an undertaking is the type that "may affect" an eligible site, the agency must make a reasonable and good faith effort to seek information from consulting parties, other members of the public, and Native American tribes to identify historic properties in the area of potential effect. *See* 36 CFR § 800.4(d)(2). *See also, Pueblo of Sandia*, 50 F.3d at 859-863 (agency failed to make reasonable and good faith effort to identify historic properties).

The NHPA also requires that federal agencies consult with any "Indian tribe ... that attaches religious and cultural significance" to the sites. 16 U.S.C. § 470(a)(d)(6)(B). **Consultation must provide the tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.**" 36 C.F.R. § 800.2(c)(2)(ii). (emphasis added) As discussed above, under the UN DRIP, consultation further requires the free, informed consent of the Tribe to activities that may impact such historic, religious, and cultural properties.

Apart from requiring that an affected tribe be involved in the identification and evaluation of historic properties, the NHPA requires that "[t]he agency official **shall ensure that the section 106 process is initiated early in the undertaking's planning**, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c) (emphasis added). The ACHP has published guidance specifically on this point, reiterating in multiple places that consultation must begin at the earliest possible time in an agency's consideration of an undertaking, even framing such early engagement with the Tribe as an issue of respect for tribal sovereignty. ACHP, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (November 2008), at 3, 7, 12, and 29.

Regarding respect for tribal sovereignty, the NHPA requires that consultation with Indian tribes "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C). *See also,* Presidential Executive Memorandum entitled "Government-to-Government Relations with Native American Tribal Governments" (April 29, 1994), 59 Fed. Reg. 22951, and Presidential Executive Order 13007, "Indian Sacred Sites" (May 24, 1996), 61 Fed. Reg. 26771. As discussed below, this "government-to-government," sovereign to sovereign, relationship is the foundation for the UN DRIP's and the

ILO's free, informed consent requirement in state consultations with indigenous peoples and is contrary to an exercise of plenary power by the state over indigenous peoples.

Here, the Draft EA was released and the FONSI made even though no competent cultural survey of the site has yet been conducted with any participation of the Tribe, or any members of the Tribe.

To exclude the Tribe from the NEPA/NHPA process in this way contravenes the requirements of the NHPA and NEPA, and NRC and NHPA regulations, and harms the Tribe's ability to participate in the initial identification of historic/cultural properties, squelches its voice to articulate its views, and hampers its ability to effectively participate at the later stage when the specific impacts from a particular project are analyzed. *See*, e.g., 36 CFR §§ 800.4 ("Identification of historic properties") and 800.5 ("Assessment of adverse effects"). Given these requirement of the NHPA, NEPA, and applicable regulations, the harms to the Tribe, and members of the Tribe, began accruing immediately upon NRC consideration of the Marsland License Expansion Application in a manner that segregated the Tribe's interdisciplinary, culturally-based consultation on the project from what NRC Staff considers technical and environmental concerns. These harms are exacerbated by the NRC Staff's decision to issue the Draft EA despite the lack of any meaningful involvement in any survey of the affected areas.

Binding, on Point Collateral Rulings in the CBR License Renewal Proceeding and the Powertech Proceeding

On April 30, 2015, the Board found upon the evidence from the *Powertech* hearing that the consultation *process* used by the NRC Staff there, which was the very same process used in regards to the CBR Marsland Expansion Area application here, was inadequate and did not meet the NRC Staff's full legal obligation to consult:

> The FSEIS has not adequately addressed the environmental effects of the Dewey-
> Burdock project on Native American cultural, religious and historic resources, and the required meaningful government-to-government consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place. Because of these facts, procedures must be put in place to assure that the required NEPA hard look is taken, the NRC's Part 51 environmental regulations are satisfied, and an opportunity for meaningful consultation is provided.
>
> ...We therefore conclude that additional consultation between the NRC Staff and the Oglala Sioux Tribe is necessary.
>
> ...Finally, given our conclusion that the inadequate discussion of potential impacts to Sioux cultural, historical or religious sites in the FSEIS or Record of Decision is a significant deficiency in the NRC Staff's NEPA review,

> this Board could require the immediate suspension of the issued materials license.[10]

Then, on May 26, 2016, another NRC Board issued its own opinion and ruling on the adequacy of these same procedures and substance of consultation in regards to the CBR License Renewal proceeding. The Board found that:

> the NRC Staff's literature reviews focused largely on Euro-American resources and Euro-American cultural artifacts ...would not be expected to uncover sites of significance to Indian tribes – which for the most part are recorded orally. Furthermore, it is highly unlikely that literature searches would lead to the identification of specific TCPs within the license area, regardless of whether they could qualify as historic properties under the NHPA. Dr. Nickens for the NRC Staff testified that literature reviews and historical background checks "should be a corollary" to a TCP study or survey because a literature search cannot "'ascribe the cultural meaning" to a TCP Lakota people would"'

LR Decision, May 26, 2016, 83 N.R.C. at 389. These solely Euro-American literature sources were employed in regard to the MEA as well. See, Section 3.6.2. From the Draft EA, no attempt was made to obtain the oral history of the the Očhéthi Šakówiŋ or the Lakȟóta Oyate, or any of the indigenous nations or peoples having current and ancestral ties to the area. The Board remarked that "the area around the Crow Butte mine is 'steeped in history.' This calls for *greater* scrutiny of the license area, not less." *Id.*, 83 N.R.C. at 390.

As to the conditions for an appropriate survey, the Board noted that the NRC Staff's own expert, Dr. Nickens, "actually acknowledged that a more structured process with the involvement of tribal elders is a better TCP survey approach. He further stated '[a]nd I agree with [Mr. Catches Enemy (the indigenous OST expert)] that a proper TCP survey, as I've stated previously involved elders and bringing the elders to the filed as possible and so forth." *Id.*, 83 N.R.C. at 389. Mr. Catches Enemy testifying for the OST proposed a more structured approach consisting of spiritual advisors and elders staying on site on dates and times and under conditions of their direction over a significant amount of time necessary to determine the spiritual and cultural sites and character of the area. *Id.* Clearly, despite that decision having been issued by the Board to the NRC Staff almost 2 years ago, the NRC Staff has ignored the NRC Board's clear ruling and direction on this very issue.

The NRC Board went further in considering the adequacy of the very same November 2012 TCP survey by the Crow Nation and the Santee Sioux Nation heavily relied upon by the NRC Staff in the Draft EA for the Marsland Expansion Area.

> Even setting aside all of these considerations, however, the November 2012 TCP Survey still cannot satisfy the NRC Staff's Identification Obligations

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[10] *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Facility), LBP-15-16, Dkt. No. 40-9075, ASLB No. 10-898-02-MLA-BD11, 81 NRC ____ (ML15120A299), at 42-44.

> under NHPA because the TCP surveyors were not appropriate for the task. As discussed above, neither the Crow Nation nor the Santee Sioux Nation, the two groups participating in the November 2012 TCP Survey, are Lakota tribes and neither has a sufficient relationship to the license area. In fact, the Crow Nation had previously advised Crow Butte's contract of its lack of connection to the license area, a fact that was passed on to the NRC Staff.
>
> We do not dispute that Mr. Goodman and others on the NRC Staff genuinely believed that the Santee Sioux and the Crow Nation could identify the TCPs of tribes other "than just the Santee Sioux Nation and the Crow Nation." But the evidence does not support any such belief. Indian tribes are distinct nations -- a concept recognized in the NRC Staff's own NUREG-2173, which notes that each Indian tribe has a unique history and experience "with its own customs, culture, concerns, interests and needs."
>
> Significantly here, the Crow Nation is not a Sioux nation, and therefore it is neither Lakota nor Dakota. Moreover, the Crow Nation reservation is located in southern Montana. Dr. Nickens, the NRC Staff's own expert, acknowledged that, unlike the Oglala Sioux Tribe, which considers the area in and around the Black Hills its ancestral homeland, the Crow Nation had little involvement in Nebraska.
>
> Similarly, although the Santee Sioux Nation is a Sioux nation, and a Dakota tribe, it is not a Lakota tribe. Moreover, the Santee Sioux reservation area is located on the opposite end of Nebraska, 300 miles from the license area, and as Dr. Nickens explained, the Santee Sioux originated in Minnesota. Although it moved westward from Minnesota, it did not move into Nebraska until it was settled on a reservation in the far eastern part of the state.

Id., 83 N.R.C. at 499-400. The Board found "by a preponderance of the evidence that the NRC Staff's TCP survey of the Crow Butte License area did not meet its Identification Obligations under NHPA." *Id.*, 83 N.R.C. at 402. It is that very same insufficient showing by the NRC Staff, that very same evidence, that underlies the Draft EA for the Marsland Expansion.

Then, the Board examined whether the NRC Staff satisfied its "hard look" obligations under NEPA. As mentioned previously, the Board remarked that NEPA required the agency to go further.

> The NHPA and NEPA both impose procedural steps to improve agency decisionmaking, and many of the NHPA's requirements overlap with those of NEPA. Of particular importance here, NEPA requires each federal agency to undertake a "hard look" at the environmental impacts of each major federal action -- which would include impacts of license renewal on TCPs. 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.**

Id., 83 N.R.C. at 402 (emphasis provided) (citations omitted). For this reason, the NRC Staff's summary dismissal of even the intangible spiritual and cultural sites and character identified by the Crow Nation and the Santee Sioux Nation in their 2012 TCP survey because they were not eligible for the National Register was a violation of NEPA under this rule. The Board found that "by a preponderance of the evidence that the EA is deficient for failing to take a hard look at potential TCPs within the Crow Butte license area, including the EA's failure to analyze the objections raised by the tribes with respect to the inadequacy of the open site TCP survey." *Id.*, 83 N.R.C. at 404.

On December 23, 2016, the Commission affirmed the Board's ruling in *Powertech* that the NRC Staff had failed to satisfy NEPA's "hard look" requirement, that NEPA requires more than mere satisfaction of the NHPA consultation requirement.

> The NHPA imposes several obligations on federal agencies, which proceed in a step-by-step manner. The consultation requirement continues throughout the steps. The first step is identifying any historic properties that might be affected by the federal undertaking (here licensing), and in doing so, making a reasonable and good faith effort to seek information from consulting parties, including Native American Tribes, to aid in that identification. ...
>
> But, as discussed by the Board, the identification of historic properties is not the end of the NHPA consultation process. After it identifies eligible sites that might be affected by the project, an agency must assess and resolve potential adverse effects in consultation with tribes that attach religious and cultural significance to those sites. In its ruling on Contention 1B, the Board found that the Staff had not adequately consulted with the Tribe on the second and third steps; that is, despite its good faith effort to consult in order to identify historic properties, the Staff had not demonstrated that it provided the Tribe with the opportunity to identify concerns about those properties and participate in the resolution of any adverse effects. The Board, after a merits hearing, reasonably concluded that the Staff's consultation with the Tribe was insufficient to meet these requirements.

Powertech, Commission Decision, 84 N.R.C. at 249. That same analysis of the NHPA / NEPA process and substance employed by CBR and the NRC Staff to the MEA applies equally here. The Draft EA is insufficient.

The Draft EA summarizes the nature and extent of the so-called consultation, which the Tribe submits was inadequate and not meaningful. Article 19 of the UN Declaration on the Rights of Indigenous Peoples is informative concerning the requirements and scope of adequate and meaningful consultation by states with indigenous peoples. It provides: "***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.***" (emphasis supplied) This requirement of consultation for the purpose of obtaining, if possible, the free, prior and informed consent of the indigenous peoples potentially affected by the state measures, recites and affirms the settled doctrine found in the landmark treaty ILO Convention 169 (1989), art. 6, sec. 2: "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. The following article elaborates on that process: "In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. ...Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. ...Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit." *Id.*, at art. 7, secs. 1, 3, and 4.

As previously mentioned, the United States is a signatory state of the UN DRIP and although under its provisions the treaty is not binding international law, it does provide guidance in determining the meaning and scope of "consultations" with indigenous peoples, including the Oglala Lakȟóta Oyate through the Oglala Sioux Tribe. Particularly in light of the IACHR *Dann* decision and the companion UN CERD Early Warning and Urgent Action decision regarding the Western Shoshone, and the recommendations of both directing the United States to bring federal Indian law in compliance with its international human rights obligations concerning indigenous peoples, the UN DRIP consultation provisions are in line with those recommendations as they define the consultation process as for the purpose of obtaining free, informed consent to the state action from the affected indigenous peoples, for the purpose of obtaining the cooperation of affected indigenous peoples in the formulation, implementation and evaluation of state plans and programmes that may directly affect them, and for the purpose of protecting the interests, the environment of the territories they inhabit, of the affected indigenous peoples. Only then, does consultation have meaning and become adequate in recognizing and protecting the collective human rights of indigenous peoples affected by state licensure of activities that may affect them.

If informed consent is not freely given by the affected indigenous peoples, either the consultation was unsuccessful and the activities cannot proceed, or if the state proceeds without the consent, it must properly justify and demonstrate lawful excuse for the violations of the collective human rights of the affected indigenous peoples, including the collective human right to self-determination, as it further infringes upon and violates the sovereignty of the affected indigenous peoples and nation. Nowhere in the Environmental Assessment is it demonstrated that the Tribe and its people have been adequately "informed" of how the expansion of the CBR activities for several more decades may affect them, and nowhere in the EA is it demonstrated that the Tribe has given its free consent to the issuance of license for the Marsland expansion or the activities of CBR. Nowhere in the Environmental Assessment is there any discussion, let alone justification, found excusing the NRC from its violations of the collective human rights of the Očhéthi Šakówiŋ, the Tribe, and the Oglala Lakȟóta Oyate in the issuance of the license

expansion to CBR. Without this showing, the Draft Environmental Assessment is insufficient and inadequate and the issuance of the license expansion would be unlawful.

Failure to Take the Requisite "Hard Look" at Environmental Justice Impacts

The Draft EA also fails to take the requisite "hard look" at whether relicensing the CBR facility would cause disproportionate and adverse impacts on minority and low-income populations within the 50-mile environmental impact area around the facility when compared to the impacts on the non-Environmental Justice ("EJ") population.

Although not expressly bound by the Executive Order on Environmental Justice, EO 12,898 (1994), the NRC has committed to undertake environmental justice reviews. *Dominion Nuclear North Anna, LLC*, CLI-07-27, 66 NRC 215, 237-38 (2007).

> As part of that commitment, the Commission issued a Policy Statement in 2004, setting out its position on the treatment of environmental justice issues in the agency's licensing and regulatory activities. The Policy Statement re-stated and expanded upon the "environmental justice" doctrines then emerging from a handful of the NRC's adjudicatory decisions and also from two Staff guidance documents. Although the Policy Statement charged the Staff with diligently investigating potential adverse environmental impacts on minorities and low-income populations, it directed the Staff to conduct an even more detailed examination in situations where the Staff finds that "the percentage in the impacted area exceeds that of the State or the County percentage for either the minority or low-income population." Under those circumstances, the Commission charged the Staff to consider environmental justice "in greater detail." As explained below, the Board has suggested that we clarify the meaning of the quoted phrase and determine whether the Staff's FEIS satisfied our "greater detail" standard in this proceeding.

Id., at 238 (citations omitted).

"Environmental justice, as applied at the NRC, ...means that the agency will make an effort under NEPA to become aware of the demographic and economic circumstances of local communities where nuclear facilities are to be sited, and take care to mitigate or avoid special impacts attributable to the special character of the community." *Private Fuel Storage, LLC*, CLI-02-20, 56 NRC 147, 156 (2002). "'Disparate impact' analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those communities." *La. Energy Servs.*, L.P., CLI-98-3, 47 NRC 77, 100 (1998).

This detailed environmental justice examination is mandated by NEPA to fulfill its purposes. "NEPA has twin aims. First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. ... Congress did not enact NEPA, of course, so that an agency would contemplate

the environmental impact of an action as an abstract exercise. Rather, Congress intended that the 'hard look' be incorporated as part of the agency's process of deciding whether to pursue a particular federal action." *Baltimore Gas and Elec. Co. v. N.R.D.C., Inc.*, 462 U.S. 87, 97,100 (1983) (citations omitted). "NEPA promotes its sweeping commitment to prevent or eliminate damage to the environment and biosphere by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 371 (1989).

NEPA also requires that the environmental impact statement include as a component of the "hard look," among other information, a "detailed" statement of "any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. §4332(2)(C)(ii). The Supreme Court in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989), construed this provision to require **"a detailed discussion of possible mitigation measures."** "[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. ...[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." *Robertson*, 490 U.S. at 351-52; *see also, South Fork Band Council of Western Shoshone of Nev. V. U.S. Dept. of Int.*, 588 F.3d 718, 727 (9th Cir. 2009); *Limerick Ecology Action, Inc. v. U.S. N.R.C.*, 869 F.2d 719 (3rd Cir. 1989); *Calvert Cliffs 3 Nuclear Project, LLC*, LBP-09-4, 69 NRC 170, 228-29 (2009).

The implementing NRC regulation listing the information that must be included in the ER, 10 C.F.R. § 51.45(b)(2), restates this NEPA mandate. NRC regulation 10 C.F.R. §51.103(a)(4) also requires the Commission to state in the record of decision whether it "has taken all practicable measures within its jurisdiction to avoid or minimize environmental harm from the alternative selected, and if not, to explain why those measures were not adopted. Summarize any license conditions and monitoring programs adopted in connection with mitigation measures."

As the Supreme Court emphasized in *Robertson*, a detailed discussion of mitigation measures cannot be had without the gathering of the information necessary for that discussion. As the NRC itself has noted, "the population distribution in the vicinity of the site affects the magnitude and location of potential consequences from radiation releases." 48 Fed.Reg. at 16,020. In regards to mitigating environmental justice issues here, that requires a full examination of all of the impacted EJ communities and institutions within the 50-mile radius of CBR facility.

Because the EJ information, discussion, and analysis contained in the Draft EA for the Marsland Expansion are all incomplete. The Draft EA acknowledges that the Oglala Lakȟóta Oyate, the Oglala Lakota people, are found within a 50-mile radius of the Marsland Expansion Area. Draft EA, Section 3.7.1, Table 3-12. Yet, in the Draft EA's superficial environmental justice discussion, Section 3.7.4, there is no mention at all let alone any discussion of the Oglala Lakota people just identified in a previous section. Furthermore, the Draft EA in Sections 3.6.2, 3.6.3, 3.6.4, and 3.6.5, admits the historic, cultural, and spiritual interests of the Oglala Lakota people in the area containing the MEA that may be impacted by the mining activities that are proposed for the MEA. Those interests are particular and special to the Oglala Lakota people and the Očhéthi

Šakówiŋ and to a lesser extent other indigenous peoples with ancestral ties to the area, but not to the non-indigenous population of the area. As such, the Oglala Lakȟóta Oyate and the Očhéthi Šakówiŋ would suffer adverse impacts disproportionate in both kind and amount from that of the general population of the area from the MEA activities. The Draft EA is entirely void of any discussion of those disproportionate impacts or of any mitigation measures that could be taken.

The systemic omission of Tribal and indigenous interests from the body of the Draft EA and the dismissive tone and manner of the references to the Tribe and its interests by the NRC Staff in much of the EA is highly insensitive. Outside of the discussion of the history of the indigenous use of the CBR area and the historic and cultural interests, the sovereign treaty-secured territory of the Tribe is persistently referred to as a "County" in South Dakota, as if the Tribe was not a sovereign indigenous nation. Draft EA, Section 3.7.1, Table 3-12. The Draft EA fails to mention the Tribe's interest in the lands including their claims of title to the Unceded Lands. The Draft EA's description of the "Affected Environment" mentions the non-Indian agricultural uses of the area but fails to mention the treaty, historic, cultural, and spiritual interests of the Tribe and its people in the area that are also part of the environment affected by CBR's activities. Section 3.1. The "Land Use" table, Table 3-1 includes virtually all uses of the lands including recreational, *but* the historic, cultural, and spiritual uses of the area by the Tribe and its people and other indigenous people. Draft EA, 3-19. Likewise, the discussion of the uses of the area includes recreational, agricultural, residential, commercial, industrial and mining, and even "habitat" for fish and wildlife, but again wholly omits any mention of the use of the land by the Tribe and its people and other indigenous peoples. Draft EA, Section 3.1. The discussion in the Draft EA of the use of surface and groundwater resources once again wholly omits the treaty interests of the Tribe and its people to the waters on and under the lands in question and wholly omits the uses of those waters by the Tribe and its people as downstream from the CBR facility. Draft EA, Section 3.3. Even its cursory Environmental Justice discussion, at Section 3.7.4, there is no mention of the Tribe and its people. It's as if the Tribe does not exist.

This means that the NRC Staff would have completed a more in-depth analysis of the environmental justice impacts if it had included the 96% minority population living at Pine Ridge Indian Reservation as being affected. But because it only looked at the 15-mile area near the MEA, which is only 4% Native and 10% minority, it found no need to conduct the more detailed environmental justice analysis.

This failure of the NRC Staff to conduct the more detailed environmental justice analysis, to take a "hard look," is a violation of NEPA.

Article 2 of the UN DRIP executed by the United States provides that "Indigenous peoples ...are free and equal to all other peoples ...and have the [collective] right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." Article 26, Section 3 of the UN DRIP further provides: "States *shall* give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." (emphasis supplied) As held by the IACHR in the *Dann* case, by the UN CERD in the *Western Shoshone* petition, systemic, institutionalized, racial and ethnic collective discrimination of indigenous peoples by the state as a legacy of

colonialism, racism, and genocide, is a violation of international laws, including those signed and ratified by the United States such as the ICERD, and is a violation of their collective human rights to their spirituality, culture, health, property, and self-determination. For these reasons as well, the Draft EA fails to meet its legal requirements.

The Draft EA Fails to Adequately Analyze Cumulative Impacts

The Draft EA fails to adequately analyze cumulative impacts associated with the proposal as required by 10 C.F.R. §§ 51.10, 51.70 and 51.71, and the National Environmental Policy Act, and implementing regulations.

"The CEQ regulations require agencies to discuss the cumulative impacts of a project as part of the environmental analysis. 40 C.F.R. § 1508.7." *Davis v. Mineta*, 302 F.3d at 1125 (10th Cir. 2002). "Of course, effects must be considered cumulatively, and impacts that are insignificant standing alone continue to require analysis if they are significant when combined with other impacts. 40 C.F.R. §1508.25(a)(2)." *New Mexico ex rel. Richardson*, 565 F.3d at 713, n. 36. Federal courts have recently interpreted the cumulative impact requirement in the mining context:

> In a cumulative impact analysis, an agency must take a "hard look" at all actions. [A NEPA] analysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. ... Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of Western Shoshone, 608 F.3d 592, 603 (9th Cir. 2010) (rejecting NEPA document for mineral exploration that had failed to include detailed analysis of impacts from nearby proposed mining operations).

A cumulative impact analysis must provide a "useful analysis" that includes a detailed and **quantified** evaluation of cumulative impacts to allow for informed decision-making and public disclosure. *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1066 (9th Cir. 2002). The NEPA requirement to analyze cumulative impacts prevents agencies from undertaking a piecemeal review of environmental impacts. *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1306-07 (9th Cir. 2003).

The NEPA obligation to consider cumulative impacts extends to all "past," "present," and "reasonably foreseeable" future projects. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971-974 (9th Cir. 2006) (requiring "mine-specific ... cumulative data," a "quantified assessment of their [other projects] combined environmental impacts," and "objective quantification of the impacts" from other existing and proposed mining operations in the region).

This cumulative impacts analysis thus must address not only past uranium mining in the region by CBR or others, but also present and foreseeable uranium development - including the License Renewal Area, the North Trend Expansion Area, the Marsland Expansion Area and the

Three Crows Expansion Area (the "CBR Expansion Areas"). The NRC Board has already held that the NRC Staff's cultural resources survey conducted for the License Renewal Area was insufficient and in violation of both the NHPA and NEPA. For those same reasons, based on the same survey procedures and evidence, the cultural resources surveys for the Marsland Expansion Area are also insufficient and in violation of both NHPA and NEPA – as are the like survey procedures and substance for the North Trend Expansion Area and the Three Crows Expansion Area. It is impossible, then, for the NRC Staff in the Draft EA at Sections 5.6.1 and 5.6.1 to draw any conclusions regarding the cumulative impacts on historic and cultural resources or places of religious or cultural significance.

Furthermore, in the discussion of the cumulative impacts upon equal justice populations, Section 5.7.2, there is no mention at all of the Oglala Lakȟóta Oyate or the Očhéthi Šakówiŋ and cumulative impacts of these 4 *in situ* mining projects upon their cultural and spiritual and legal interests in the impacted area.

The Draft EA is insufficient for those reasons as well.

CONCLUSION

For all the foregoing reasons, the Draft EA and its finding of no significant impact is insufficient, fundamental inadequate, and fatally flawed and fails to comply with NEPA, the NHPA, international law, the 1851 and 1868 Ft. Laramie treaties, and fundamental human rights law. The proposed Marsland Expansion EA must be rejected in favor of a full and proper environmental impact statement that adequately and fully addresses the very significant impacts the proposal would have upon the Oglala Lakȟóta Oyate and the Očhéthi Šakówiŋ.

Dated this 29th day of January, 2018.

FOR THE OGLALA LAKHOTA OYATE
(THE OGLALA SIOUX TRIBE)

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Date: January 28, 2013

To: David C. Frankel, esq.

Mr. Frankel,

As per your recent request, I have reviewed the CBR (Crow Butte Resources, Inc.) environmental report for the Marsland Expansion Area dated May 2012. Although I agree with Dr. T. Steinacher, the Nebraska Historical Archeologist, that the research submitted by Graves, et al would not impact any significant Historical properties, I do find several problems with the lack of any Native American properties located during the survey.

First, I worked in this general area from 1992 through the Fall of 1995 as the Forest Archeologist for the Nebraska National Forest. It was my experience that whenever we surveyed areas near or bordering on water resources, ponds, creeks, et cetera, we would almost invariably find prehistoric camp sites and related process sites. Throughout this proposed project area, there are a number of both permanent and intermittent water resources of all kinds, including creeks, springs and natural ponds.

Second, the survey that was performed in this area was over approximately 4,500 acres, which was surveyed between November 2010 and February 2011. It was also my experience in working in this area that during that time of the year, snow and ice covered most of the ground surface, at least greater than 85%. My problem with this scenario is that it would be relatively impossible to locate 99% of prehistoric/Native American sites without a much higher level of ground surface observation, i.e., greater than 60-75%, preferably greater than 90%. As stated in the synopsis of the cultural report, this area of the Nebraska Panhandle has not been subjected to even minor investigation. Due to this lack of research, it would appear intuitively evident that an investigation with little or no ground surface visibility would be insufficient to state that no Native American/prehistoric materials were present.

Thirdly, this project will eventually cause significant ground disturbance, and yet there is no evidence that any type of subsurface testing process for any level of cultural materials took place. It would seem that some form of subsurface testing to at least below the alluvium level be performed over at least the area where most of the surface impacts will occur. I would suggest that this type of processing be instituted on at least the higher elevations near water resources where the alluvium layer would be shallower due to natural erosional processes.

Fourth, although it is true that the primary tribal use of this area was by the Sioux (sic) and Cheyenne, a number of tribes utilized the Nebraska Panhandle area. According to just the treaties from this area, a number of tribes are not noted for this cultural review. One of the most encompassing of these treaties is the 1851 Fort Laramie Treaty involving the Sioux or Dahcotah (sic), Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras. The People listed as "Sioux or Dahcotah" are not easily defined, but include the Lakota Nations of the Sicangu, Brule, Oglala, Minnecoujou, Hunkpapa, Izipaco, Sihasapa, and Ooinunpa nations. Added to these are the Sans Arcs, Santee and Yanktons who are Dakota speakers. The Mandans and Arrickara noted in the said treaty would also include the Hidatsa peoples of the Three Affiliated Nations. As to the Cheyenne defined in the 1851 Treaty, this would indicate both the current Northern and Southern Cheyenne Nations since the division is an artificial artifact of the Government reservation system. In addition, although not listed in this treaty, the Pawnee would also have utilized this area, at least the northern Pawnee or Skidi. This last is indicated by the number of stories, legends or accounts of battles between the Pawnee and many of the above noted Peoples throughout the current project areas. Added to this treaty are a number of other

treaties signed with individual tribes between 1851 and 1868, the time period of the two major treaties signed by the United States and a number of interested or subjugated tribes.

If there are any further questions or actions that you might require of me, please do not hesitate to contact me at the above address, telephone number and/or e-mail address.

Sincerely,

Louis A. Redmond, PhD
President/owner
Red Feather Archeology

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Yoder, WY 82244
(307) 534-2172
redfeather@wyomail.com

Date: April 29, 2015
To: Mr. Dave Frankel, esq.
Attorney-at-Law

Mr. Frankel,

As I stated earlier, the materials utilized for the Crow Butte Expansion appear to be faulted in several places. First, there does not appear to be any identification or accreditation of whomever it is that allegedly conducted the Class III survey or the TCP survey(s). There are, as I stated earlier, very specific qualification that must be met for field surveyors, supervisors and investigators of Class III archeological surveys. In addition, TCP investigations need to be done in concert between qualified anthropologist or historians and qualified tribal elders of all concerned tribal groups. In this case, we know that this has not been done in that the Oglalla Sioux Tribe has not been adequately consulted in any Traditional Cultural Property survey. These surveys are not a simple viewing of the ground, but also a realization of the impact that any projects might have upon past or in fact, current traditional properties, such as *hanblechia* or Sun Dance sites which can have their sacred view-shed impacted. To the best of my knowledge, and any literature available to me at this time, none of this has been considered at this time which would be a direct violation of the current cultural heritage laws.
Sincerely,

Louis A. Redmond, PhD
President, Red Feather Archeology

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PO Box 116
Yoder, WY 82244
(307) 534-2172
redfeather@wyomail.com

Date: May 5, 2015
To: Mr. Dave Frankel, esq.
Attorney-at-Law

Mr. Frankel,

As previously stated, the materials utilized for the Crow Butte Expansion cultural resource licenses appear to be faulted in several places. First, there does not appear to be any identification or accreditation of whomever it is that allegedly conducted the Class III survey or the TCP survey(s). There are, as I stated earlier, very specific qualifications must be met for field surveyors, supervisors and principal investigators of Class III archeological surveys and Traditional Cultural Property investigation. The standards for principal investigators are laid out in the *Secretary of Interior's Standards and Guidelines*, which are the defining standards nationally. The minimum qualification for the principal investigator is clearly spelled out in the "Professional Qualifications" pages of the *Standards*. This is defined for Archeology as a *minimum* of a graduate degree in archeology, anthropology or closely related field *plus:*

1. ***At least 1 year of full-time professional experience or equivalent specialized training in archeological research, administration or management:***
2. ***At least 4 months of supervised field analytic experience in general North American archeology, and***
3. ***Demonstrated ability to carry research to completion.***

In addition to this minimum qualification, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric period. A professional in historic archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the historic period.

In addition to archeologists, a principal investigator may also have an advanced degree in History, Architectural History, Architecture, or Historic Architecture, however these last are generally meant primarily for principal investigators involved with Historical Archeology and Historical Traditional Cultural Properties. These also have additional field and supervisory qualification as appropriate to their own specific fields.

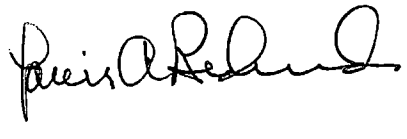
In other words, a principal investigator must have a minimum of a graduate degree in a specific field, with a minimum of one year of qualifying generalized work in that field, and addition specific areal work of usually 4 to 6 months within the general region of work.

In addition, Traditional Cultural Property are also held to this same high standard for principal investigators. Also, Traditional Cultural Property investigations need to be done in concert between anthropologists or historians qualified at this same high level, and qualified tribal elders of *all* concerned tribal groups. This last is in accordance with the stated goals of the *Protection of Historic Properties 36 CFR part 800 subpart B (the 106 process).* In this case, we know that this has not been done, in that at a minimum the Oglalla Sioux Tribe has not been adequately consulted in *any* Traditional Cultural Property survey. How many other tribal groups that should have been consulted for both historic properties and Traditional Cultural Properties and were not is at this point, anyone's guess according to the available materials I have been able to read.

These surveys are not a simple viewing of the ground surfaces, but also a realization of the impact that any projects might have upon past or in fact, current traditional ceremonial or cultural properties, such as *hanblechia* (vision quest) or Sun Dance sites which can have their sacred view-shed and/or landscape impacted. To the best of my knowledge, and any literature available to me at this time, none of this has been considered at this time, which would be a direct violation of the current cultural heritage laws. In the last several years the Advisory Council on Historic Preservation has been, to say the very least, been frantically attempting to solve the problems of cultural groups and the myriad problems of Traditional Cultural Landscapes (see http://www.nps.gov.history/nr/publications/guidance/TCP comments.htm) for example. To say that this has become an open wound for the Federal Government would be a gross understatement. This problem essentially began in the 1990's with two diverse landscapes or properties, San Francisco Peaks in Arizona and Poletown in Detroit, Michigan; a Native American site and a site traditionally important to Polish-Americans in Michigan. Both ended up being destroyed by "economic necessity" to the detriment of their cultural group. Traditional Cultural Properties or Landscapes are not investigations that can be written off by a simple piece of paper paid for with corporate monies. These are specifically defined just as definitively as Historical/Archeological Surveys are defined within the *Secretary of the Interior's Standards and Guidelines.* The qualifications for the principal investigators and other participants are just as high and therefore should be treated just as highly and seriously.

Also in reviewing the Nebraska State Historic State Historic Preservation Plan, especially the goals and standards for the state, it would seem that this project especially is in direct opposition to its stated plans of the State of Nebraska. Its specific goals, problems and solutions for cultural resources, archeology, and interaction with tribal groups and local populations seems to be directly opposed to what is happening at sites like Crow Butte and others in this region of the country. Not only are archeological materials being displaced, but traditional properties and landscapes are being impacted, as well as contemporary lifeways.

Sincerely,



Louis A. Redmond, PhD
President, Red Feather Archeology

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)	)	May 8, 2015

Declaration of Michael CatchesEnemy

1. My name is Michael CatchesEnemy.

2. I am a member of the Oglala Sioux Tribe which is located on the Pine Ridge Reservation where I also live, within the 50 mile radius of the Crow Butte Resources, Inc. ("CBR") in situ uranium mining facility south of Crawford, Nebraska.

3. Though I am reluctant culturally to state this in a legal document, for the purposes of establishing my background as an expert witness for my people, I reveal the following. I was chosen as a leader by my *Tiospaye* (extended family) to be a practitioner of the Spotted Eagle way for our family, of the *Oglala Lakota Oyate*, along with the seven sacred ceremonies, which includes being a leader of the sun dance ceremony. I am the proud descendent of several *Lakota Itacan / Naca* (Headsmen) such as Big Ribs, Gall, Catches Enemy, Hump, Two Bulls, and *Lakota Wicasa Wakan* (Medicine Men) such as Red Flying, Belt, Catches Enemy, Two Bulls, and Helper.

4. I am a Master's Candidate in Cultural Resource Management Archaeology at St. Cloud State University, St. Cloud, Minnesota, fulfilling all graduation requirements and completing final edits to my successfully defended thesis on "*Traditional & Naturally Significant Places process primer*" with my Graduate Committee. I earned a B.S. in Environmental Science from Oglala Lakota College Department of Math and Science in Kyle, South Dakota in May of 2003, with earned credits from Colorado State University's Department of Natural Resources, January 2000 to December 2001, then transferring to Oglala Lakota College.

5. From May of 2004 to March 2012, I have served as the Natural Resources Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency. As Natural Resources Director I identified, updated and developed tribal legislation for the protection, conservation and

management of natural and water resources. I enforced tribal environmental and natural resource laws and ensured that the Tribe's water and other natural resource rights are protected, including those within the "treaty lands" secured to the Tribe by the 1851 and 1868 Treaties. I also served as the Tribal representative to the Missouri River Recovery and Implementation Committee.

6. I have been invited to participate in many regional panels and seminars including a panel on "Paradigms for Water Quality and Health Concerns in Indian Country," at the 4th Annual William H. Veeder Memorial Conference on Indian Water Rights (2007), to which I was a founding Board Member of the Great Plains Tribal Water Alliance (2005-2012) between the Oglala, Rosebud and Standing Rock Sioux Tribes. I also serve as an Instructor on the "Human Dimensions of Natural Resources," Seminar on the Planning & Management of Tourism in Protected Areas, Warner College of Natural Resources, Colorado State University (2014 & 2015). I am an Adjunct Faculty with Oglala Lakota College presently, teaching such courses as "People and the Environment", "Cultural Resource Management", and "Lakota and the Environment" under both Departments of Math & Science and Lakota Studies.

7. Helped to establish the Oglala Sioux Tribe's first Tribal Historic Preservation Office and served as its first Historic Preservation Officer (THPO) from May 2009 – January 2010, as well as from October 2013 – April 2015, and continue my role in the preservation of historic, cultural, and spiritual resources of the Tribe as the first Tribal Archaeologist for the Cultural Affairs & Historic Preservation Office. In my activities as the former THPO, I regularly reviewed cultural resource reports and surveys, including the survey and reporting methods. I worked closely with my THPO predecessor, Wilmer Mesteth (January 2010 – October 2013), and continue to with my successor, Dennis Yellow Thunder, including the review of the in situ uranium mining activities at Dewey-Burdock in the Black Hills and the Crow Butte activities near Crawford, Nebraska.

8. The Oglala Sioux Tribe is a sovereign indigenous nation and body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota. The Tribe also claims the territory and lands within the 1851 and 1868 Ft. Laramie treaties, including the lands upon which the CBR facility is located and operates. The United States of American acknowledges a nation-to-nation relationship with the Tribe.

9. The Oglala Sioux Tribe is the elected government of the Oglala Lakota people, with a governing body recognized by the United States of through the Secretary of the Interior. The federal recognized Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under section 16 of the Indian Reorganization Act of June 18, 1934, Ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.

10. The United States has imposed protectorate relationship upon the Tribe by which the United States has assumed trust responsibilities with the Tribe and its people as the beneficiaries, including the protection of the Tribe, its water and other natural resources, its historic, cultural, and spiritual interests, and the health and well-being of the Oglala Lakota.

11. In 1992, the United States Congress adopted amendments to the National Historic Preservation Act ("NHPA") (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer ("SHPO") with respect to tribal land for the purposes of the Act. Through that provision of the NHPA, the United States has recognized the responsibility and authority of the designated THPOs, and specifically for the Oglala Sioux Tribe in September 2009 in enforcing the obligations of the United States and its agencies under the NHPA and other federal laws enacted to protect and preserve Native American interests in water, other natural resources, historic and cultural sites and items, and the practice of indigenous culture, religion and spirituality. The Oglala Sioux Tribe's THPO further exercises the inherent sovereign authority of the Tribe recognized by the United States in treaties with the Tribe and in its continuing nation-to-nation relationship with the Tribe.

12. I am familiar with the license renewal application submitted to the US Nuclear Regulatory Commission ("NRC") by CBR for the continuation of its activities at its in situ uranium mining facility south of Crawford, Nebraska.

13. As previously stated, the lands encompassed by the application are within the Territory and ancestral lands of the Great Sioux Nation (the Seven Council Fires), which includes the band of the Oglala Lakota (the Oglala Sioux Tribe) as acknowledge by the United States in the Ft. Laramie treaties of 1851 and 1868. As a result and despite being physically and illegally dispossessed of current possession of the Treaty lands lying outside the existing Reservation border, the Tribe continues to possess ancestral, historic, cultural, religious, and spiritual interests and relationship with those lands and the historic and cultural resources, artifacts, sites, etc., found thereon belong to the Tribe and, collectively, the other Sioux bands. The Tribe concedes neither title to nor sovereignty to the United States over these treaty lands. In addition to interests protected by treaties with indigenous nations, the United States by enacting the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4330 et seq.), the Native American Graves Protection and Repatriation Act ("NAGPRA") (25 U.S.C. §§ 3001 et seq.), the NHPA (16 U.S.C. §§ 470 et seq.), the American Indian Religious Freedom Act ("AIFRA") (42 U.S.C. § 1996), the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. §§ 2000bb et seq.), and other statutes, has assured that the historic and cultural resources and cultural, religious, and spiritual interests of a tribe will be protected, even when they are not within reservation boundaries. Any harm done to these resources and interests of the Oglala Lakota peoples by the activities of CBR will be an injury to the Tribe caused by the Applicant

and condoned by the NRC, the Tribe's trustee under the United States' assumed trust relationship.

14. The site of the Crow Butte activities is historically significant as it is within the area utilized by the Sioux as an encampment during period of forced removal by the United States of the Sioux from their ancestral lands and during the existence of Fort Robinson and the "sign or starve" treaty-making tactics of the United States in the mid to late 1800s. Given the large encampment, it can be reasonably presumed that many sites and artifacts of significant historic and cultural importance to the Tribe exist in the area that encompasses the existing Crow Butte facility and the surrounding Crow Butte and Crawford area.

15. Crow Butte itself is considered by the Lakota and other tribes to be a sacred peak used to this day by members of the Tribe for vision quests and spiritual awareness. Like all such indigenous sites of great spiritual value and importance, including Bear Butte, Owl Maker Butte (commonly known as Harney Peak), Bear's Lodge (commonly known as Devil's Tower), and many others for example, the mere presence of industrial activity in the vicinity significantly infringes upon the spiritual experience. This is even more so when, like Crow Butte, the activity requires frequent traffic in the immediate area and is destructive of the earth, water, flora, fauna, and the environment.

16. NHPA and these other federal laws require "consultation" with the Oglala Sioux Tribe, and other affected tribes, regarding the existence and protection of such cultural resources and interests. As the holders of lawful title and sovereignty over all of the Treaty lands, including the lands where the Crow Butte facility is located, the Tribe's position is that "consultation" is for the purpose of the United States and its agencies obtaining the free, prior, and informed "consent" of the Tribe as to actions that may affect Tribal interests, as required by the UN Declaration on the Rights of Indigenous Peoples, signed by the United States, and the International Convention on the Elimination of All Forms of Racial Discrimination, signed and ratified by the United States.

17. Without compromising the Tribe's position, I am aware that the United States and its agencies do not consider the term "consultation" as requiring the consent of the affected tribe. It is within the context of that understanding and the more limited consultation obligations acknowledged by the United States that the following comments are made. I am familiar with the "consultation" process used by the NRC Staff and the private contractor, SRI Foundation, employed by the Applicant in regards to this matter. That process largely consisted of various invitations beginning in early 2011 by the NRC Staff and SRI to engage in a predetermined consultation process, including meetings, telephone and written communications, and participation in archeological field surveys, that combined the review of the Crow Butte license renewal with the Crow Butte expansion, known as the North Trend, and the Dewey-Burdock project. The NRC Staff had already been in communications with the Tribe since 2009 on the Dewey Burdock license application.

18. An "information gathering" meeting for numerous tribes on these three license applications was conducted by the NRC Staff in early June 2011. The meeting was held on the Pine Ridge Reservation and attended by the Oglala Sioux Tribe. Another meeting with the NRC Staff organized by SRI was held in Rapid City, South Dakota, in mid-February 2012, again on all three projects at which time the NRC requested a "statement of work" from each tribe. At that meeting, the participating tribes, including the Oglala Sioux Tribe, emphasized the nation-to-nation relationship of each tribe with the United States and objected to the roles that the Applicant and its contractor, SRI, were taking in the Section 106 process. The tribes further required that knowledgeable tribal representatives, including tribal elders and spiritual leaders, rather than just archaeologists conduct the cultural surveys under appropriate conditions and circumstances approved by each tribe. The tribes, caucusing among themselves, also stated the requirement that the process include all tribes participating together collaboratively in respect for their collective interests rather than being divided by the survey process suggested by SRI and the NRC Staff.

19. A follow-up conference call was held between the tribes, including the Oglala Sioux Tribe, and the NRC Staff, the Applicant, and SRI in late April 2012, again on all three projects. The tribes restated their requirement that the surveys be conducted according to an appropriate process developed by the tribes, not the Applicant or SRI. Supplemental conference calls were conducted in early and late August 2012 during which the tribes objected to the statement of work that was presented to them by the NRC Staff, including modifications that were made by the NRC Staff / SRI without discussion to a statement of work submitted by participating tribes. Many of the aspects of the revised statement of work presented to the tribes were simply not feasible. The tribes distinguished between approaches that identify archaeological sites and those that identify places and items of spiritual and cultural significance to them and emphasized to the NRC Staff that the statement of work needed to come from the tribes, not the NRC or SRI. The tribes discussed the need for government to government meeting with the NRC and a programmatic agreement between the United States and the indigenous nations responsive to their concerns.

20. Despite all of these problems and the lack of an acceptable statement of work or a programmatic agreement, the NRC Staff, SRI, and the Applicant went ahead with setting up site visits for "field studies" in November and December of 2012. The Applicant stated that it would pay $10,000 to each tribe that agreed to participate. Only two tribes accepted the offer for a site visit under the conditions presented by the NRC Staff and SRI. Then, in late December 2012 and early January 2013, the NRC Staff sent out new Section 106 "consultation" letters to the tribes, including the Oglala Sioux Tribe.

21. On February 20, 2013, Mr. Terry Clouthier, the Tribal Archaeologist for the Standing Rock Sioux Tribe, sent the NRC a letter condemning the Section 106 process employed by the NRC Staff, SRI, and the Applicant in regards to the Dewey-Burdock project, the same Section 106 process employed in regards to the Crow Butte license renewal and North Trend

applications. Mr. Clouthier stated: "This current proposal is just short of a bribe disguised as a token identification effort. It calls into question the entire integrity of the 106 process." Mr. Clouthier also notes that the NRC failed to take seriously the process endorsed by the tribes to identify culturally and spiritually significant sites and resources. I fully agreed with Mr. Clouthier's assessment and comments as they would apply to the identical Section 106 process used by the NRC Staff for the Crow Butte license renewal.

22. The following month, on March 15, 2013, Roberta Joyce Whiting, Project Review Officer, for the Tribe's Historic Preservation Office, in respect for the collective interests and approach of all of the tribes, notified the NRC Staff that the Oglala Sioux Tribe would refuse to participate in the field surveys since the other tribes were not participating. That was followed by a formal letter from Oglala Sioux Tribal President, Bryan V. Brewer, Sr., to the NRC on March 22, 2013, expressing the sovereignty of the Tribe over treaty lands and the right to act collaboratively with the other tribes, the Seven Council Fires, to protect traditional cultural interests on their aboriginal homelands and territories. President Brewer then stated similar objections to the Section 106 process being employed by the NRC Staff as those stated by Mr. Clouthier. Another letter was sent by President Brewer on March 29, 2013 expressing the special relationship and interests of the Tribe and its members to the lands under NRC review.

23. In late May, 2013, the NRC Staff finally conducted government-to-government consultations in Rapid City with the Oglala Sioux Tribe and the other tribes over all of the pending license applications, including the Crow Butte license renewal. However, those consultations were unsuccessful in resolving the differences between the tribes and the NRC Staff over the process being employed to determine the impact of the Crow Butte activities and the two other proposed projects on the tribal historic, cultural, religious, and spiritual interests.

24. Despite the complete breakdown of the consultation process and without a historic, cultural, religious, or spiritual survey of the impacted areas that included the collective participation by the affected tribes, including the Oglala Sioux Tribe, the NRC Staff and the Applicant went ahead with the preparation and issuance in 2014 of the Safety Evaluation Report ("SER") and the Environmental Assessment ("EA") and approval of renewal of the Applicant's license. No draft EA was circulated that might have provided an additional opportunity to resolve these disputes between the tribes, including the Oglala Sioux Tribe, and the NRC Staff and the Applicant. Without the collaborative participation of the tribes, including the Oglala Sioux Tribe, no adequate comprehensive study identifying all such resources could be conducted by the NRC Staff or the Applicant.

25. According to the EA, archaeological surveys were conducted by state agencies in the 1980s. Those surveys identified "21 prehistoric and historic period archaeological sites," of which 15 were evaluated by the state agencies as "not eligible" for nomination and potential listing on the National Register of Historic Places. It was reported that between 2010 and 2012 the Applicant visited the 6 sites that are potentially eligible and "confirmed" that the sites did not incur any impacts from activities there through 1995. The EA does not describe any uniform or

scientifically-verified methodology employed by these surveys, nor explain any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listing on the National Register, while others are not granted such protections. Further, the "confirmation" by the Applicant, not the NRC Staff, of no impacts on the 6 eligible sites only covered the period through 1995. These surveys also failed to identify the "sign or starve" Lakota encampments of the 1880s.

26. Archaeological surveys are not cultural resource surveys and are not sufficient to identify all sites and resources of historic, cultural, and spiritual significance to tribes. The EA acknowledges the historic interests of the Oglala Lakota in Crow Butte, a mere one-half mile east of the Crow Butte license area. It also acknowledges the spiritual and religious importance of Crow Butte as a place used by the Lakota for vision quests and of the area for the collection of herbs for medicinal and ceremonial uses. The EA acknowledges that only two tribes engaged in field reviews. Both of those tribes, the Santee and the Crow, were not among those tribes closed to the area and having the greatest historic contact with the area. These surveys were not sufficient to identify spiritual, cultural, and historic resources significant to the Oglala Sioux Tribe and the other tribes. The failures of the NRC Staff and the Applicant to resolve the disputes with the tribes over the surveys leaves the Tribe's historic, cultural, and spiritual resources at risk of harm, including permanent destruction. The failures of the NRC Staff to obtain the Tribe's participation deprives the EA of any mitigation measures or other plans to diminish impacts to the Tribe's historic, cultural, and historic resources at the Crow Butte site.

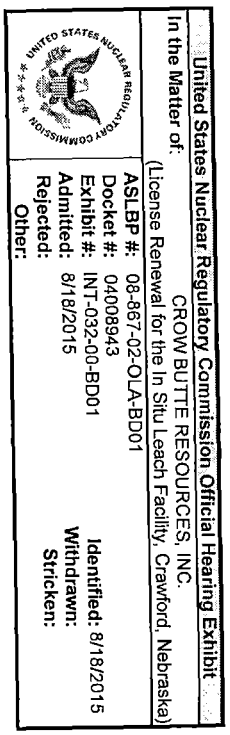
27. In August 2014, I provided testimony under oath in the Dewey-Burdock license proceeding on the insufficiency of the historic, cultural, and spiritual resources survey process employed by the NRC Staff and the Applicant. Since that same process was used by the NRC Staff and the Applicant for the Crow Butte license renewal application and the North Trend license application, my testimony would be equally applicable to those license applications and the insufficiencies of the process used by the NRC Staff and the Applicant. I incorporate that testimony here by reference.

This Affidavit is submitted in accordance with 10 C.F.R. Section 2.304(d) and 28 U.S.C. Section 1746. I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Executed on May 8, 2015 at Pine Ridge Reservation.

Michael CatchesEnemy

INT-032



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)	)	May 8, 2015

Declaration of Dennis Yellow Thunder

1. My name is Dennis Yellow Thunder.

2. I am a member of the Oglala Sioux Tribe which is located on the Pine Ridge Reservation where I also live, within the 50 mile radius of the Crow Butte Resources, Inc. ("CBR") in situ uranium mining facility south of Crawford, Nebraska.

3. I was chosen by the Thunder Beings to be a Heyoka, a traditional medicine man, and a Bear Man of the Oglala Lakota people and practice the seven sacred ceremonies of the Tribe. I am a leader of the sun dance ceremony and Sundance Chief. I am the great, great, grandson of Lakota Chief American Horse. I am also a well-know traditional Lakota artist.

4. Currently I am the Tribal Historic Preservation Officer ("THPO") for the Tribe and the Director of the OST Office of Cultural Affairs and Historic Preservation. In my activities as the THPO, I regularly review cultural resource reports and surveys, including the survey and reporting methods. Prior to being appointed OST THPO I served as a Cultural Resource Specialist and with the OST Tribal Historic Preservation Office in 2013-2014 and worked closely with my predecessors, Wilmer Mesteth and Michael Catches Enemy. I was also a Natural Resources Technician with the OST Natural Resources Department in 2011-2013 and on the Tribal Mining Working Group. I have served for several years as a representative of the OST on the Tribal Interest Working Group of the Missouri River Recovery and Implementation Committee. In 2007 I was the honored guest at the meeting of the Swiss Association 4WINDS in Ornas, France. Over the last 15 years I have made numerous presentations and testified on Lakota culture and spiritual beliefs and on the impacts of natural resource development upon them. I am also the founder of the Raymond Yellow Thunder Memorial Cultural Art Center in honor of my relative Raymond Yellow Thunder.

5. The Oglala Sioux Tribe is a sovereign indigenous nation and body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota. The Tribe also claims the territory and lands within the 1851 and 1868 Ft. Laramie treaties, including the lands upon which the CBR facility is located and operates. The United States of American acknowledges a nation-to-nation relationship with the Tribe.

6. The Oglala Sioux Tribe is the elected government of the Oglala Lakota people, with a governing body recognized by the United States of through the Secretary of the Interior. The federally recognized Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under section 16 of the Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.

7. The United States has imposed protectorate relationship upon the Tribe by which the United States has assumed trust responsibilities with the Tribe and its people as the beneficiaries, including the protection of the Tribe, its water and other natural resources, its historic, cultural, and spiritual interests, and the health and well-being of the Oglala Lakota people.

8. In 1992, the United States Congress adopted amendments to the National Historic Preservation Act ("NHPA") (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer ("SHPO") with respect to tribal land for the purposes of the Act. Through that provision of the NHPA, the United States has recognized the responsibility and authority of the designated THPOs of the Oglala Sioux Tribe in enforcing the obligations of the United States and its agencies under the NHPA and other federal laws enacted to protect and preserve Native American interests in water, other natural resources, historic and cultural sites and items, and the practice of indigenous culture, religion and spirituality. The Oglala Sioux Tribe's THPO further exercises the inherent sovereign authority of the Tribe recognized by the United States in treaties with the Tribe and in its continuing nation-to-nation relationship with the Tribe.

9. I am familiar with the license renewal application submitted to the US Nuclear Regulatory Commission ("NRC") by CBR for the continuation of its activities at its in situ uranium mining facility south of Crawford, Nebraska.

10. As previously stated, the lands encompassed by the application are within the Territory and Ancestral lands of the Great Sioux Nation (the Seven Council Fires), which

includes the band of the Oglala Lakota (the Oglala Sioux Tribe) as acknowledged by the United States in the Ft. Laramie treaties of 1851 and 1868. As a result and despite being physically and illegally dispossessed of current possession of the Treaty lands lying outside the existing Reservation border, the Tribe continues to possess ancestral, historic, cultural, religious, and spiritual interests and relationship with those lands and the historic and cultural resources, artifacts, sites, etc., found thereon belong to the Tribe and, collectively, the other Sioux bands. The Tribe concedes neither title to nor sovereignty to the United States over these treaty lands. In addition to interests protected by treaties with indigenous nations, the United States by enacting the National Environmental Policy Act ("NEPA") (42 U.S.C. §§ 4330 et seq.), the Native American Graves Protection and Repatriation Act ("NAGPRA") (25 U.S.C. §§ 3001 et seq.), the NHPA (16 U.S.C. §§ 470 et seq.), the American Indian Religious Freedom Act ("AIFRA") (42 U.S.C. § 1996), the Religious Freedom Restoration Act ("RFRA") (42 U.S.C. §§ 2000bb et seq.), and other statutes, has assured that the historic and cultural resources and cultural, religious, and spiritual interests of a tribe will be protected, even when they are not within reservation boundaries. Any harm done to these resources and interests of the Oglala Lakota peoples by the activities of CBR will be an injury to the Tribe caused by the Applicant and condoned by the NRC, the Tribe's trustee under the United States' assumed trust relationship.

11. The site of the Crow Butte activities is historically significant as it is within the area utilized by the Sioux as an encampment during period of forced removal by the United States of the Sioux from their ancestral lands and during the existence of Fort Robinson and the "sign or starve" treaty-making tactics of the United States in the mid to late 1800s. Given the large encampment, it can be reasonably presumed that many sites and artifacts of significant historic and cultural importance to the Tribe exist in the area that encompasses the existing Crow Butte facility and the surrounding Crow Butte and Crawford area.

12. Crow Butte itself is considered by the Lakota and other tribes to be a sacred peak used to this day by members of the Tribe for vision quests and spiritual awareness. Like all such indigenous sites of great spiritual value and importance, including Bear Butte and Devil's Tower for example, the mere presence of industrial activity in the vicinity significantly infringes upon the spiritual experience. This is even more so when, like Crow Butte, the activity requires frequent traffic in the immediate area and is destructive of the earth, water, flora, fauna, and the environment. As their ancestral lands, the Lakota people also have a sacred relationship and responsibility as care-takers of these resources.

13. NHPA and these other federal laws require "consultation" with the Oglala Sioux Tribe, and other affected tribes, regarding the existence and protection of such cultural resources and interests. As the holders of lawful title and sovereignty over all of the Treaty lands, including the lands where the Crow Butte facility is located, the Tribe's position is that "consultation" is for the purpose of the United States and its agencies obtaining the free, prior, and informed "consent" of the Tribe as to actions that may affect Tribal interests, as required by

the UN Declaration on the Rights of Indigenous Peoples, signed by the United States, and the International Convention on the Elimination of All Forms of Racial Discrimination, signed and ratified by the United States.

14. Without compromising the Tribe's position, I am aware that the United States and its agencies do not consider the term "consultation" as requiring the consent of the affected tribe. It is within the context of that understanding and the more limited consultation obligations acknowledged by the United States that the following comments are made. I am familiar with the "consultation" process used by the NRC Staff and the private contractor, SRI Foundation, employed by the Applicant in regards to this matter. That process largely consisted of various invitations beginning in early 2011 by the NRC Staff and SRI to engage in a predetermined consultation process, including meetings, telephone and written communications, and participation in archeological field surveys, that combined the review of the Crow Butte license renewal with the Crow Butte expansion, known as the North Trend, and the Dewy-Burdock project. I have read the description by Michael Catches Enemy of the meetings and communications between the NRC Staff and the tribes, including the Oglala Sioux Tribe, and the archaeological and field surveys, and the expressed positions taken by the Oglala Sioux Tribe, and believe his description to be accurate.

15. Despite the complete breakdown of the consultation process and without a historic, cultural, religious, or spiritual survey of the impacted areas that included the collective participation by the affected tribes, including the Oglala Sioux Tribe, the NRC Staff and the Applicant went ahead with the preparation and issuance in 2014 of the Safety Evaluation Report ("SER") and the Environmental Assessment ("EA") and approval of renewal of the Applicant's license. No draft EA was circulated that might have provided an additional opportunity to resolve these disputes between the tribes, including the Oglala Sioux Tribe, and the NRC Staff and the Applicant. Without the collaborative participation of the tribes, including the Oglala Sioux Tribe, no adequate comprehensive study identifying all such resources could be conducted by the NRC Staff or the Applicant.

16. According to the EA, archaeological surveys were conducted by state agencies in the 1980s. Those surveys identified "21 prehistoric and historic period archaeological sites," of which 15 were evaluated by the state agencies as "not eligible" for nomination and potential listing on the National Register of Historic Places. It was reported that between 2010 and 2012 the Applicant visited the 6 sites that are potentially eligible and "confirmed" that the sites did not incur any impacts from activities there through 1995. The EA does not describe any uniform or scientifically-verified methodology employed by these surveys, nor explain any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listing on the National Register, while others are not granted such protections. Further, the "confirmation" by the Applicant, not the NRC Staff, of no impacts on the 6 eligible sites only covered the period through 1995. These surveys also failed to identify the "sign or starve" Lakota encampments of the 1880s.

17. Archaeological surveys are not cultural resource surveys and are not sufficient to identify all sites and resources of historic, cultural, and spiritual significance to tribes. The EA acknowledges the historic interests of the Oglala Lakota in Crow Butte, a mere one-half mile east of the Crow Butte license area. It also acknowledges the spiritual and religious importance of Crow Butte as a place used by the Lakota for vision quests and of the area for the collection of herbs for medicinal and ceremonial uses. The EA acknowledges that only two tribes engaged in field reviews. Both of those tribes, the Santee and the Crow, were not among those tribes closed to the area and having the greatest historic contact with the area. These surveys were not sufficient to identify spiritual, cultural, and historic resources significant to the Oglala Sioux Tribe and the other tribes. The failures of the NRC Staff and the Applicant to resolve the disputes with the tribes over the surveys leaves the Tribe's historic, cultural, and spiritual resources at risk of harm, including permanent destruction. The failures of the NRC Staff to obtain the Tribe's participation deprives the EA of any mitigation measures or other plans to diminish impacts to the Tribe's historic, cultural, and historic resources at the Crow Butte site.

This Affidavit is submitted in accordance with 10 C.F.R. Section 2.304(d) and 28 U.S.C. Section 1746. I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Executed on May 7, 2015 at Pine Ridge Reservation.

Dennis Yellow Thunder

Dennis Yellow Thunder