UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	Docket No. 40-8943 MLA-2
	)	
CROW BUTTE RESOURCES INC.	)	ASLBP No. 13-926-01-MLA-BD01
	)	
(Marsland Expansion Project)	)	June 20, 2018

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

The Oglala Sioux Tribe ("OST" or "Tribe") pursuant to 10 C.F.R. § 2.309(i)(2) submits the following combined reply to NRC Staff's and Crow Butte Resources' responses to the Tribe's migrated, renewed. and new contentions based on the Final Environmental Assessment (April 2018) ("Final EA") (ML 18103A145) for the Marsland Expansion Area License Amendment Application of Crow Butte Resources, Inc. ("Crow Butte" or "CBR"), also referred to as the "Crow Butte Operation" ("CBO").

I. TIMELINESS

CBR and NRC Staff, each in their respective Responses, once again misapprehend the timeliness consideration regarding NEPA-specific environmental contentions. For contentions that challenge the adequacy of NRC Staff's environmental analysis under NEPA, the triggering event is the release of the final NEPA document, in this case, the Final EA.

As the Commission explained in CLI 15-17, upholding the Board's ruling in LBP 15-11 on this very same issue:

> Our rules of practice provide that an evidentiary hearing on environmental contentions may not take place until the completion of the Staff's environmental review. [fn 76: *See* Final Rule, Changes to the Adjudicatory Process, 69 Fed. Reg. at 2187 (explaining that hearings on environmental contentions must be delayed until after the Staff issues its environmental review document: "the staff may not be in a position to provide testimony or take a final position on some issues until these documents have been completed. This may be the case in particular with regard to the NRC staff's environmental evaluation"); *id*. at 2202 (explaining difference between safety and environmental contentions with respect to burden of proof); *see also* 10 C.F.R. § 2.332(d) ("Where an environmental impact statement is involved, hearings on environmental issues addressed in the EIS may not commence before the issuance of the final EIS.").

In the Matter of Crow Butte Resources, Inc. CLI 15-17 at 17. The Draft EA, released in December, 2017 was, by definition, a draft, subject to change after the comment period. Raising contentions regarding the sufficiency of NRC Staff's NEPA analysis at that time would suffer from lack of ripeness.

The OST did, however, submit lengthy comments to the Draft EA and, upon issuance of the Final EA, submitted its NEPA-based contentions at the first available opportunity to do so. The Commission further explains, "Even had intervenors proposed their contentions earlier, the hearing could not take place until the Staff's environmental review was complete." *Id.* Therefore, the Board should reject the assertion that the Contentions are untimely due to failure to assert them before the final EA was published. The Board should further reject arguments that Contentions filed in accordance with the Scheduling Order are untimely.

Reply to NRC & CBR re: Contention A -

OST submits that it is very material and within the scope of the proceeding to determine whether Crow Butte's plans have changed to such an extent that the basic assumptions underlying the entire EA require reconsideration. Such is the case with Crow Butte's decision to cease operations. The continued operation of the Crow Butte mine is a fundamental assumption and "first principle" of the entire EA and all the information upon which it relies. All such information needs to be re-evaluated in light of the cessation of operations. The OST became aware of the decision to cease operations after the Draft EA and the deadline for the filing of contentions. Therefore it is new information that may be submitted and Contention A is a valid contention.

CBR states without any support that the cessation of operations is completely irrelevant. Such unsupported argumentation must fail. At a minimum it shows a material issue in genuine dispute which must be resolved.

NRC Staff states that the Crow Butte mine is not going to cease operations even though that what it has publicly stated and reported in the Cessation Notice to the NRC. NRC states that because Crow Butte was planning to cease operations some day, it is not new information that it has now ceased operations. OST submits that the fact that the operations have now ceased is new information. There is no prior public statement or NRC filing by Crow Butte informing that the cessation of operations has occurred. Therefore, the NRC's argument concerning Contention A must fail.

Further, the NRC Staff argues that Contention A should have been filed the 30th day after it was posted on ADAMS, notwithstanding the Board's Scheduling Order in this proceeding which takes precedence and governs the timeliness of filing in this proceeding. Further, the April letters were just a bit late to be included in the April mandatory disclosures in this proceeding although they were included in the May disclosures. OST submits that it would be inequitable and contrary to the scheduling order to reject the timeliness of Contention A on the grounds that it should have been filed on May 16 instead of May 30. OST filed within 30 days of becoming aware of the new information and in compliance with the Scheduling Order. Accordingly, the NRC Staff's argument should be rejected.

The OST rejects the notion that calling out fundamental issues in the EA in light of the new information should be considered 'impermissible flyspecking'.

In its summation against Contention A (at NRC Response, p. 20), the NRC staff outlines the nature of the dispute between OST and the NRC Staff as being based on OST's misunderstandings. OST submits that this demonstrates that there exists a genuine dispute on a material issue in this proceeding. Therefore, Contention A should be admitted.

Reply to NRC & CBR re: Contention B -

As to Contention B, the OST observes that the NRC Staff would like to rely on information from the existing site when it suits its needs to demonstrate something at the MEA and would like to call the existing site irrelevant when OST points out that the consumptive use at the existing site's restoration in practice does not support the assumptions in the MEA concerning the same issue. Therefore, the NRC's argument must fail.

Extraordinary consumptive use at the existing site, which as indicated by the Extension Amendment Request, generates data that needs to be used in the projections for consumptive use at the MEA.

Crow Butte would like to dispose of this Contention B by arguing that it is outside the scope of this proceeding. But Crow Butte's experience at the existing site is cited throughout the EA to support a variety of assumptions in the EA concerning restoration and the water consumption related thereto. Therefore, OST submits that Crow Butte's actual results from its attempts at restoration at the existing site are very much relevant to and within this proceeding. Further since the Extension Amendment Request is essentially the same as Crow Butte finally acknowledging that

Reply to NRC & CBR re: Contention C -

NRC Staff essential argues that there it would make perfect sense to construct the MEA while having ceased and decommissioned the existing site even though the MEA is an expansion of the existing site. OST submits that such argument lacks common sense. If operations have ceased at the existing site, then it would naturally follow that there will be no operations at the expansion area. What sense would it make to construct wells at the MEA while removing the very production equipment from the existing site that is required to be used to process the resin produced at the MEA? None. Therefore, the NRC's argument must fail and Contention C should be admitted.

Reply to NRC & CBR re: Contention D -

The NRC Staff argues that the general outline of a proposed approach for cultural resources in Powertech was available in December 2017 but fails to mention that the approach was not agreed on until March 2018 and, at one point in the process, it seemed as if it would be rejected by Powertech entirely. Only when it was agreed to and adopted by the parties as a solution to the issue presented in Powertech, which is analogous to the same issue presented in this proceeding, such agreement and adoption became new information on which Contention D is based. Therefore, it should be admitted because it is relevant to this proceeding, and the failure of the NRC Staff to include it in the EA is a material issue in genuine dispute.

Crow Butte's protestations should also be rejected. The same issues presented among the NRC Staff, the OST and Powertech, and the same issues presented among the NRC Staff, the OST and Crow Butte, are relevant to the resolution of such same issues in this case. Therefore, the resolution of the issues in the Powertech case is relevant to the issues in this case related to the cultural resources survey. The fact that resolution was achieved by virtue of an agreement adopted by the parties in the Powertech case is relevant to this proceeding and is related to a material issue in genuine dispute.

Further, Crow Butte mischaracterizes OST's argument - we are not saying that 'every conceivable relevant document that comes out after the EA publication' should be the basis to revise the EA. Rather, OST is saying that the first ever resolution of this issue with the OST, albeit in another matter involving a different licensee, is newsworthy and monumental and relevant and should be made part of the EA and to do so is a failure to disclose and evaluate very material information to the public.

Reply to NRC & CBR re: Contentions E & F

On pages 30 – 31 of its Response, the NRC Staff maintains that OST Contention E is inadmissible because it challenges the adequacy of pump test data has been available since the ER was published in 2012. This mistakes the point of the OST's contention. There is no dispute that the pump test data has been available since 2012. However, OST contends that merely parroting the self-serving, and clearly erroneous interpretation of this data does not satisfy NRC Staff's NEPA obligation to take a "hard look" at the science.

Under no rational definition of the terms, can an aquifer with a transmissivity range from 230 ft^2/day to 2,469 ft^2/day and storativity range from $1.7x10^{-3}$ to $8.32x10^{-5}$ be considered homogeneous and isotropic. That leads to the inescapable conclusion that the assumptions underlying both the Theis and Cooper-Jacobs models are violated. The EA fails to identify this dangerous oversimplification of the pump test data analysis, let alone offer up any rationale to explain why the assumptions underlying both tests might be appropriately disregarded in this case.

The failure of the Final EA to take a hard look at the pump test data and instead, to accept a clearly flawed, radically oversimplified characterization of the site hydrogeology in the target aquifer also forces OST Contention F that NRC Staff disputes on pages 31-33 of its Response.

Without an accurate picture of the hydrogeology, the NRC Staff is in no position to meaningfully evaluate the potential impacts from mining and restoration. Nor, for that matter, is

CBR's restoration plan to be considered any more likely to restore the aquifer to pre-mining conditions than the original restoration plan at the original CBR mine site. The Final EA's cursory review and evaluation of the potential impacts from mining and restoration lacks the scientific integrity that could rise to the hard look standard that NEPA requires. Instead, of informing the public about the actual site hydrogeology and the likely potential impacts of mining and restoration, most of that data will be shielded from public review after the close of the NEPA process. Therefore, Contentions E & F should be admitted.

Reply to NRC & CBR re: Contention G -

NRC Staff predicates its objection to Contention G on the same timeliness defense as it asserted with respect to Contentions A and B. For the same reasons as articulated by OST in reply to NRC and Crow Butte regarding Contentions A and B, the OST asserts that Contention G is also timely because the prior information now needs to be evaluated in light of the actual data obtained by Crow Butte in its restoration efforts and as described in the April Extension Amendment Request. Since the Extension Amendment Request contains an admission that Crow Butte's restoration efforts have failed and require more time is, itself, new information, the Contention is not barred as being untimely.

OST submits that the genuine dispute of a material issue is that the information in the EA, which may have been accurate before the issuance of the Extension Amendment Request, is made inaccurate by the concession by Crow Butte that, essentially, its restoration efforts and plans have failed and it will require more time via an amendment.

Reply to NRC & CBR re: Contention H -

OST has pointed out specifically Section 4.3.2.1 and called for it to be revised in light of the new information. The new information is that the consumptive use modeling is not accurate in light of actual results in restoration attempts at the existing site. Therefore the discussion based on that in the EA should be revised.

As reply to Crow Butte, OST has asserted that the admission of its failure in restoration attempts, as indicated by the Extension Amendment Request, is itself new information and such failure needs to be evaluated and the data related thereto needs to be incorporated into the EA.

OST also reminds Crow Butte that an expert opinion is not required to plead a contention of omission. Therefore, its arguments concerning lack of expert opinion are misplaced and should be disregarded.

Reply to NRC & CBR re: Contention I -

Crow Butte fails to see that the new information in the Cessation Notice and in the Extension Amendment Request are required to be incorporated into the cumulative impact analysis because they represent a fundamental shift from operations to cessation thereof and a failure of restoration efforts that have become grounds for an extension of time for restoration to continue. Such failure and extension is material to the cumulative impacts analysis and the failure to include it in the EA violates NEPA.

Again, Crow Butte's emphasis on lack of expert opinion letters is misplaced and should be disregarded because expert opinions are not required to plead contentions of omission.

OST'S EA CONTENTION J: SUBJECT MATTER JURISDICTION

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

The NRC Staff's and CBR's responses to the substance of the jurisdictional challenge are based on the U.S. Supreme Court's decision in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), and the subsequent application of that decision by the Board in previous decisions.[1] However, the Tribe, a sovereign entity with an acknowledged "nation-to-nation" relationship

[1] *See*, *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), LBP-80-24, 68 NRC 691, 712 (2008); *Crow Butte Resources, Inc.* (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 337 (2009).

with the United States,[2] has never accepted the *Sioux Nation* decision nor the authority of the United States to unilaterally "abrogate" the Fort Laramie Treaty of 1868 and not return the lands that the Supreme Court held were wrongfully taken by the United States, and does not accept that decision here as it is ultimately a matter not of domestic US law but of the international law of treaties as a dispute over territory between sovereign nations. Vienna Convention on the Law of Treaties, art. 26 (May 23, 1969), 1155 U.N.T.S. 331, 339; *see also, Dann v. United States*, Case No. 11.140, Report No. 75/02, Doc. 5.1 at 860 (2002).

For those reasons, the Board lacks subject matter jurisdiction over the matter before it.

OST'S EA CONTENTION K: FAILURE TO OBTAIN OST'S CONSENT

As stated in OST'S EA Contention K, the licensing by the NRC of the activities proposed by CBR for the Marsland Expansion Area requires the consent of the OST, is also based on the Treaty-supported claims of OST to the Unceded Lands, including the MEA, and the nation-to-nation relationship between the OST and the United States which is controlled by the covenants and principles of international law, including the UN Declaration on the Rights of Indigenous Peoples (UN DRIP), cited in the Contention.

The NRC Staff dismisses the UN DRIP and other international human rights covenants that the United States as signed and ratified as "not binding." NRC Response, p. 36. CBR dismisses them as "outside the scope of this proceeding." CBR Response, p. 20. However, the UN DRIP has been repeatedly lauded and paraded before the international community by the

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

United States as recently as when it submitted its human rights compliance report to the United Nations Human Rights Council, stating therein:

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

United States Department of State, Report of the United States of America Submitted to the U.N. High Commissioner for Human Rights in Conjunction with the Universal Periodic Review (February 2, 2015), ¶54; http://www.state.gov/documents/organization/237460.pdf. This representation was made to the United Nations pursuant to the UN resolution that set up the Human Rights Council[3] and pursuant to the 1945 Charter of the United Nations and the Universal Declaration of Human Rights[4], both of which the United States were instrumental in drafting and which the United States has signed and ratified. In the UN DRIP, art. 37, sec. 1, as discussed in the Tribe's initial submission, the signatory states, including the United States, commit themselves to "recognize, observe, and enforce" and to "honour and respect" treaties made with indigenous peoples, including the Great Sioux Nation. The UN DRIP at article 26 mandates ["*shall*"] signatory states to "give legal recognition and protection of [indigenous] lands, territories and resources" and indigenous "land tenure systems." Further, the signatory states to the UN DRIP at articles 19 and 10 respectively, also commit themselves to obtaining the "free, prior and informed *consent*" before removing indigenous peoples from their lands or engaging in measures that may affect indigenous peoples.

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[3] UN Resolution 60/251 (April 3, 2006).

[4] UN Resolution 217 A (III) (1948).

As discussed in the Tribe's initial submission, the United States also signed and Congress ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (making it part of US domestic law) and signed and ratified the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man which were the basis of the *Dann* decision against the United States by the OAS Inter-American Commission on Human Rights (of which had and exercised lawful and proper jurisdiction over the United States pursuant to the OAS Charter). The signing of the UN DRIP by the President of the United States and the declarations of the United States State Department to the United Nations and the international community - *after* the Supreme Court's decision in *Sioux Nation* – along with the ratification by Congress of the UN Charter, the Universal Declaration, the ICERD, the OAS Charter, and the American Declaration, all proper and legal international covenants, are not hollow exercises of US exceptionalism, but actually are meaningful and provide guidance under indisputably enforceable law in deciding questions pertaining to the nation-to-nation relationship between the United States and sovereign indigenous nations, including the Oglala Sioux Nation, such as the nature of indigenous title, the enforcement of treaties with indigenous peoples, and the scope and nature of "consultation" with indigenous nations.

The NRC Staff and CBR also appear to contend, without citation to any legal authority, that the NRC has no authority to apply relevant international law. International law issues have been entertained and decided by many federal administrative tribunals. *See, e.g., In the Matter of VIA USA*, 9 FCC Rcd.5224 (F.C.C.), 9 F.C.C.R. 5224, 1994 WL 495183 (FCC 1994); *Matter of Medina*, 19 I. & N. Dec. 734, 1988 WL 235436 (BIA 1988); *Republic of Panama v. U.S.A.*, 1933

A.M.C. 1662, 1933 WL 62463 (GCC 1933). No agency of the federal government has considered the effect of these international law principles and doctrines and decisions and United States international declarations upon the continuing validity of the Supreme Court's rulings in *Sioux Nation*. The Tribe is prepared to present globally esteemed expert testimony in support of its positions on the issues of international law raised by this Contention. *See*, *e.g.*, *United States v. Hicks*, 2004 WL 3088512 (USDDMC 2004).

OST'S EA CONTENTION L AND M: HISTORICAL, CULTURAL, SPIRITUAL RESOURCES

The NRC Staff and CBR both contend that OST EA Contentions L and M, the historical, cultural, and spiritual resources contentions are untimely. This has been discussed above and was discussed at length in each of those Contentions in which OST sets forth the highly significant findings and decisions by the Board in the related License Renewal and Powertech matters which have occurred since OST made its initial submission, OST Contention 1, which was originally admitted by the Board in 2013 and dismissed in October 2014 (not on the merits) when OST's counsel failed to respond to an NRC Staff's motion for summary disposition based upon a partial draft of the EA.[5] It was not until this Board's ruling in the License Amendment matter[6] on May 26, 2016, that the scope of the "hard look" requirement for NEPA consultation / consideration of these issues was determined and a new resources survey protocol was required. As described in these OST EA Contentions, since October 2014, many significant and

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[5] *See*, Memorandum and Order dated October 22, 2014 (ML 14295A237).

[6] *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.

substantive additional purported Section 106 and NEPA "consultations" by the NRC Staff have occurred, comments submitted, surveys designed, deficiencies in same determined by the Board, further consultations and evidentiary submissions made both before and after the full draft EA and the final EA were issued. The proper assessment of the historical, cultural, and spiritually has been terribly flawed for a period of years since the NRC Staff's issuance of the early, partial, draft EA on June 30, 2014. On January 29, 2018, OST timely submitted comments on these matters to the full Draft EA[7] and then again on May 30, 2018, to the Final EA.

For OST EA Contentions L and M should be admitted.

<u>OST'S EA CONTENTION N:</u> ENVIRONMENTAL JUSTICE

In its submission as to OST EA Contention N, the Tribe sets forth in detail the fundamental inadequacies of the environmental justice considerations contained in the Environmental Assessment prepared by the NRC Staff particularly as to the NRC Staff's failure to consider the impact on both the tangible and the intangible interests of OST and its people to their Treaty and ancestral lands. Without those considerations, the environmental justice analysis by the NRC Staff in the Final EA is incomplete, insufficient, and flawed.

CBR responds contending that OST provides no evidence to support its contention that those interests exist. That response wholly ignores the extensive citations to such evidence contained in the Final EA's acknowledgement of the ancestral ties of the Lakota and other Sioux to this area and that evidence contained in OST EA Contentions J (Treaties), L, and M which relate portions of submission of Dr. Redmond on the Marsland Expansion Area and the

[7] ML18046A060; ML18060A100 (adopted by reference).

testimony of Dr. Redmond, Mr. Catches Enemy, and Mr. Yellow Thunder on the Lakota ties to that area of Nebraska. These Contentions contain far more than enough evidence to demonstrate the merit of the claims of OST historic, cultural, and spiritual interest that were not considered in the MEA Final EA's environmental justice analysis.

The NRC's only response to OST EA Contention N is its assertion that this contention is untimely. OST is at a loss to understand this assertion as the Final EA and its environmental justice analysis on the MEA did not exist until the Final EA was issued on April 28, 2018,[8] and the Draft EA on the MEA with the initial environmental justice analysis did not exist until December 11, 2017,[9] and on January 29, 2018, the OST properly and timely submitted comments to the NRC on these specific insufficiencies in the NRC Staff's environmental justice analysis.[10]

For these reasons, OST EA Contention N should be admitted.

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[8] ML 18103A145.

[9] ML 17334A870.

[10] ML18046A060 at pages 24-26.

III. CONCLUSION

For all the foregoing reasons, the Board should find that these renewed and new contentions are admissible. The OST hereby requests oral argument on contention admissibility.

Dated this 20th day of June, 2018.

FOR THE OGLALA SIOUX TRIBE:

/s/ ~ signed electronically

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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the OGLALA SIOUX TRIBE'S COMBINED REPLY TO NRC STAFF'S AND CROW BUTTE RESOURCES' RESPONSES TO THE TRIBE'S MIGRATED, RENEWED, AND NEW CONTENTIONS BASED ON THE MARSLAND EXPANSION FINAL ENVIRONMENTAL ASSESSMENT were served in the above-captioned proceeding, by email to the following.

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Dated: June 20, 2018.

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