

WESTERN MINING ACTION PROJECT

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Cynthia I. Román, Chief
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Office of Nuclear Material Safety
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U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Via Email

Dear Ms. Román:

The Oglala Sioux Tribe is in receipt of your letter dated March 1, 2019 (“March 1 letter”), in which NRC staff requested input from the Tribe regarding the ongoing efforts to establish a cultural resources survey methodology for the proposed Dewey-Burdock in situ leach uranium mine. The Oglala Sioux Tribe urges NRC staff to engage holistically in negotiations driven by qualified personnel instead of demanding interim confirmations of “the Oglala Sioux Tribe’s position on the draft methodology and the content of this [March 1, 2019] letter.” Nevertheless, this letter responds to NRC staff’s mischaracterization of the record, including the Tribe’s “positions.”

As expressed and discussed by all of the Tribal Historic Preservation Officers present at the February 22, 2019 meeting on the Pine Ridge Reservation, the Tribes remain committed to working with NRC staff and its contractor to develop a suitable cultural resources survey methodology. To date, the discussions have only reached through Section 7 of the NRC staff contractor’s Draft Methodology document. The Tribes look forward to Mr. Spangler’s explanation of the remaining Sections and additional discussion involving Mr. Spangler and the Tribes’ representatives. The Oglala Sioux Tribe notes the great importance of ensuring a proper survey methodology, as the project lands are within the traditional aboriginal territory of the Oglala Sioux Tribe, and included in the 1851 Fort Laramie Treaty and the 1868 Fort Laramie Treaty (15 Stat., 635). Further, the Tribe takes seriously the obligations of the United States government inherent in the United Nations Declaration on the Rights of Indigenous Peoples (78 Fed.Reg. 26384 (May 6, 2013)), including the requirement for free, prior, and informed consent for government actions that affect indigenous people and their cultural resources.

The legalistic and exacting tone and character of the March 1 letter has caused unnecessary delay by forcing the Oglala Sioux Tribe staff and counsel to put aside other work related to communicating about the survey methodology among its members and the other Tribes involved in the process. Instead, as NRC staff requested, the Oglala Sioux Tribe and its counsel have spent their time sorting through the multitude of assertions and characterizations made in the letter in order to provide a comprehensive and timely response. The Tribe views this formalistic approach as detrimental to the negotiations that appeared to have taken quite a positive and productive turn during the February 22, 2019 meeting on the Pine Ridge Reservation. Further, NRC staff's approach in forcing the Tribe to divert its efforts to such a detailed response is contrary to the instruction from the Board as to how the parties ought to conduct themselves toward pursuing an agreement on the survey methodology and related issues. See January 29, 2019 conference call transcript at 1537-1538 ("This is Judge Bollwerk. It strikes me that the time to exchange letters has ended now and it's time to engage. And I think you both understand that, all the parties understand that. But I think it's time to move forward and get people talking to each other."). The Oglala Sioux Tribe would prefer to switch focus back to discussions and negotiations aimed at determining a suitable methodology for the survey of cultural resources. However, the Oglala Sioux Tribe must respond in kind to NRC staff in order to correct the record and reiterate its consistent positions.

The March 1 letter appears to mischaracterize the Oglala Sioux Tribe's long-standing position regarding the March 2018 survey proposal. Contrary to NRC staff's assertions, the Oglala Sioux Tribe has never accepted a rigid application of the March 2018 proposal. Rather, the Oglala Sioux Tribe has acknowledged that while the proposal has strong potential to provide a basis for agreement on creating and implementing a survey methodology, significant details must be worked out between the parties, as well as other affected Tribes. Specifically, as noted in the March 2018 approach proposed by NRC staff, the methodology for the survey had yet to be formulated. The survey must yet be developed in a manner that integrates ecological, social, and natural scientific principles involved in conducting surveys and documenting information, while maintaining relevance to the Lakota culture. See March 16, 2018 Letter to Oglala Sioux Tribe from NRC staff (ML18074A396) at 2 ("2. The field survey will be conducted using a survey methodology that will be established in coordination with the NRC, with the support of the contractor, and the Lakota Sioux Tribes in advance of the field survey.").

With respect to the financial resources necessary to carry out the survey, it appears NRC staff has selectively quoted the April 6, 2018 transcript in making an assertion that the Tribe has not expressed concern regarding the level of the reimbursement for the survey work. In that teleconference, counsel for the Tribe specifically stated that the costs necessary to compensate for staff time to carry out the project would need to be separate from the proposed honorarium. April 6, 2018 conference call transcript (ML18100A912) at 1394, lines 2-7. Further, NRC staff inappropriately relies on selective quotes from the Tribe's February 15, 2018 response to the Board. March 1 letter at 2. Contrary to NRC staff's characterization, the Tribe did not unconditionally agree to any specific dollar amount. Rather, the Tribe unambiguously stated that the methodology required to meet NRC duties must be determined first, and only then could the costs be determined and agreed upon. Specifically, the Tribe stated with regard to costs that "it is difficult to respond precisely without knowing what Powertech is prepared to offer and without input on methodology from a qualified contractor." Notice of Oglala Sioux Tribe's Responses to NRC Staff Questions (ML18046A171) at 5.

NRC staff's letter omits other Oglala Sioux Tribe statements that express the need for a flexible approach to the financial resources necessary to carry out the cultural resources survey. For instance, in the January 11, 2019 Oglala Sioux Tribe's Response to NRC Staff's November 21, 2018 Letter (ML19011A459) at 5, the Tribe specifically raised the issue of costs for carrying out the cultural resources survey, stating unambiguously that "the Tribe is not willing to voluntarily provide NRC staff with services normally obtained through federal contract." Similarly, during the February 19, 2019 conference call discussion between NRC staff and the Oglala Sioux Tribe, the Tribe specifically requested that the NRC staff's contractor provide any examples of any cultural resources survey projects where a budget on the order of \$10,000 was considered sufficient for a pedestrian survey, including identification and evaluation of cultural resources on an area approximating that at issue with the Dewey-Burdock site. NRC staff's contractor was unable to provide any examples and to date the Tribe has not received any information with respect to the reasonableness of such a budget.

To be clear, as the Oglala Sioux Tribe has repeatedly stated, and continues to believe, the present focus of the efforts ought to be working toward and determining a suitable methodology for the cultural resources survey. Once a methodology is determined, the parties should then turn their attention to what a reasonable cost may be and what mechanisms may exist for securing the necessary funding to carry out that methodology. NRC staff has appeared to take the opposite approach by hardening its position based on the March 2018 budget estimates that were made prior to any efforts to develop a methodology, in "coordination with the NRC, with the support of the contractor, and the Lakota Sioux Tribes." See ML18074A396 at 2. The Tribe has identified at least some opportunities in this regard (see ML19011A459 at 5) and looks forward to working with NRC staff on this issue further.

With respect to the timeline, the March 1 letter quotes the Oglala Sioux Tribe's counsel in recognizing the Oglala Sioux Tribe's consistent statements that the timeline would have to be flexible based on the completion of "significant components that have not been fully vetted or described in terms of the methodology." March 1 letter at 2. The Tribe has repeatedly reiterated this position that the timelines must be based on the methodology, and that it would be arbitrary and capricious to limit the methodology to timelines created without benefit of a qualified contractor.

In fact, in the course of the proceedings at least as far back as beginning in December of 2018 – in particular on the December 6, 2018 teleconference – the Tribe specifically asserted that, particularly in light of the failures of the June 2018 efforts, the timeline must remain flexible and be informed by the specifics of the methodology as it is developed. See December 6, 2018 conference call transcript (ML18346A090) at 1478-1479 ("And so I would just note that our experience now is that the better practice is to have the generalities laid out in terms of the time line but in order to have the process work, the methodology, the designed methodology should inform the specific dates and have an opportunity to inform the specific dates that are laid out."); at 1480 ("As I had just explained, the Tribe believes that the creation of the methodology ought to be able to inform, at least on some level, the schedule as well. So we would hope that there would be some flexibility to developing a methodology that could incorporate different time components."). Additionally, during the January 29, 2019 teleconference, the Tribe again specifically communicated its position that the timeline proposed in the March 2018 approach was preliminary, and that flexibility must be maintained to ensure the actual timing of the survey is informed by the methodology:

And then as far as timing, certainly we understand that NRC Staff has put forth a proposed timeline and the Tribe is certainly willing to engage in the coming weeks in discussions, but as the Tribe noted, on the December 6th conference call amongst the parties coordinated by the Board, the Tribe believed that the precise timing of the culture resources survey components, needs to be informed by the methodology that is determined and not go through an exercise of trying to fit the methodology in the predetermined, the Tribe might contend somewhat arbitrary timelines, without regard to the specific methodology. So, the Tribe would note, sort of reiterate its discussion or its comments from the December 6th conference call, that this timing issue should be flexible to accommodate the methodology that's determined.

January 29, 2019 conference call transcript (ML19030A497) at 1531-1532. The same issue was identified in the Oglala Sioux Tribe's Response to NRC Staff's November 21, 2018 Letter. ML19011A459 at 5 ("Once the necessary confidentiality agreements are in place, the survey schedule should be reconfigured to ensure the survey methodology integrates the necessary celestial, and other, conditions required to conduct the survey."). Lastly, during the conference call among the parties on February 19, 2019, the Tribe stated the same position, to which NRC staff responded that NRC staff understood and agreed to be "flexible" in their approach to timing. Thus, there is no basis for any assertion that the Tribes' discussion of the need for flexibility in the timeline was somehow a new topic that arose during the February 22, 2019 meeting. Rather, the reference to the need for flexibility in that context was the continuation of the Tribes' long-held position on the matter.

Again, to be clear, the Oglala Sioux Tribe has stated and continues to believe that the present efforts ought to focus on the challenges of developing a suitable methodology for the cultural resources survey. Once a methodology is determined, the parties should then turn their attention to establishing a reasonable timeline to implement the methodology. The Oglala Sioux Tribe understands that it and NRC staff may have differences of opinion on the matter, but the Oglala Sioux Tribe looks forward to working with NRC staff on this issue in a holistic manner that avoids the rigid reliance on the preliminary views of a March 2018 approach that was not informed by a qualified NRC contractor.

The March 1 letter states that "NRC staff will not reopen the National Historic Preservation Act (NHPA) section 106 process and will continue to focus its efforts on resolving the remaining NEPA contention." March 1 letter at 3. However, as the February 15, 2019 draft methodology makes clear, the cultural resources survey necessarily involves the identification, evaluation, and nomination of cultural resources for inclusion in the National Register of Historic Places ("NRHP"). See February 15, 2019 Draft Methodology (ML19046A443) at 3, 4, 9, 12, 13. As such, while resolution of the NEPA contention drives NRC staff's efforts to carry out a cultural resource survey to inform its Supplemental Environmental Impact Statement, there is simply no avoiding the referenced requirements of the NHPA. Specifically, as the NHPA regulations at 36 C.F.R. Part 800 make clear, and as discussed at length during the February 22, 2019 meeting on the Pine Ridge Reservation, the NHPA applies to any federal agency's cultural resources work. The Tribe raises the NHPA issues because federal law requires compliance with its identification, evaluation, and nomination requirements. Any NRC staff effort to conduct the cultural resources survey with the accompanying identification, evaluation, and NRHP nomination without reference to the NHPA and 36 C.F.R. Part 800 regulations is potentially contrary to law and would potentially jeopardize the entire effort.

The March 1 letter asserts that the Tribe is “opposed to a scientifically based methodology.” March 1 letter at 3. This is inaccurate. The discussion at the February 22, 2019 meeting regarding the term “scientific” was to highlight for NRC staff’s contractor that the Tribes have in the past experienced problems where federal agencies discount traditional cultural and ecological knowledge in the analysis of impacts to cultural resources, development of mitigation measures, and in the evaluation of cultural resources for inclusion in the National Register of Historic Places based on a perceived need to adhere to an overly rigid definition of “scientific”. Further, National Environmental Policy Act compliance requires a “systematic interdisciplinary approach” that involves “unquantified” considerations and “ecological information.” 42 U.S.C. §4332(2)(A, B, H). There is no reason to believe there are insurmountable challenges to integrating the Lakota’s “Traditional Ecological Knowledge” discussed in the February 22 meeting into the draft methodology, even though the discussion also confirmed that NRC staff directed Mr. Spangler to construct the cultural resource survey methodology based solely on the “scientific method.”¹ The challenge of integrating the various sources of knowledge and information are a familiar component of the Tribes’ day-to-day work with other federal agencies. As previously stated, NRC staff – and therefore the negotiations – would benefit from the participation of a Tribal Liaison and contractor(s) that are familiar with Lakota Culture and the integration of social and natural sciences with Traditional Ecological Knowledge.

As the March 1 letter recounts, the Tribe has insisted on a scientifically defensible process, but it must be one that fully accounts for traditional cultural knowledge. Portions of the February 15, 2019 Draft Methodology appear to explicitly discount these aspects. For instance, the document states:

The scientific process requires the use of defined and articulated instruments to test a hypothesis or series of hypotheses by gathering observable, empirical evidence, and it calls for rigorous adherence to standards and practices accepted by scientific disciplines, such that results are measurable and replicable. But Tribal surveys might run counter to traditional scientific practices because, as discussed in Section 2.0 above, there are fundamental differences in how Indian Tribes and non-Tribal individuals view the world around them. Tribal surveys are intended to document what Tribal members believe to be significant, but these observations might not be measurable, replicable, or even observable to non-Tribal individuals.

February 15, 2019 Draft Methodology (ML19046A443) at 3. This passage appears to state that somehow Tribal members’ culturally based knowledge² and observations are not compatible with a “scientific” approach to information gathering. Thus, the Tribal Historic Preservation Officers in attendance at the February 22, 2019 meeting sought to make it explicitly clear that any definition of “scientific” in the development of the methodology that attempts to discount traditional cultural

¹ NEPA requires that “[A]ll agencies of the Federal Government shall – (A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man’s environment.” 42 U.S.C. § 4332(2)(A).

² The reduction of traditional cultural knowledge to mere “belief” is patently offensive and provides yet another reason for NRC staff to engage a qualified Tribal Liaison.

knowledge is unacceptable. The methodology, as currently drafted, relies on “scientific method” and “empirical evidence” in a way that violates NEPA’s mandate that all federal agencies use a “systematic interdisciplinary approach” that involves “unquantified” considerations and “ecological information.” 42 U.S.C. § 4332(2)(A, B, H). In order to ensure compliance with this NEPA requirement, the Tribe remains willing to develop a methodology that meets NRC duties and protects the Tribes’ interests.

With respect to NRC staff’s assertions in the March 1 letter regarding the reliance on Dr. Sebastian LeBeau’s methodology, the Oglala Sioux Tribe’s position has never been that the LeBeau method was sufficient in and of itself for development of a cultural resources survey methodology. The Oglala Sioux Tribe has also never stated that the LeBeau methodology is completely irrelevant. Rather, in its January 11, 2019 Response, the Oglala Sioux Tribe merely pointed out that NRC staff’s previous consultant, Dr. Paul Nickens, had identified the LeBeau methodology as an example of a methodology – to counter the assertions made by Powertech and NRC staff in the past that there is no way to develop any methodologies for using traditional cultural knowledge in the context of a “scientific” cultural resources survey. See January 11, 2019 Oglala Sioux Tribe’s Response to NRC Staff’s November 21, 2018 Letter (ML19011A459) at 3. As such, it is consistent to say the LeBeau methodology should be *considered and* later state that the LeBeau model should not be uniformly adopted. Notably, that January 11, 2019 Response specifically identified the LeBeau methodology as having “shortcomings” in its approach. At the February 22, 2019 meeting, the Tribes communicated that heavy reliance in the February 15, 2019 Draft Methodology document on LeBeau’s model is not appropriate and ignores criticisms of Mr. LeBeau’s 2009 dissertation.

The March 1 letter asserts that the February 15, 2019 Draft Methodology document was drafted “with sufficient depth and substance.” March 1 letter at 4-5. However, as discussed at the February 22, 2019 meeting on the Pine Ridge Reservation, the Draft Methodology document actually contains no discussion of an actual on-the-ground methodology, such as the development of items such as appropriate transects and staffing levels – among other essential components of a well-developed methodology. Notably, in the meetings held to date, the Tribes and the NRC staff consultant have yet to progress past Section 7 of the Draft Methodology document. Section 8 of the Draft Methodology document – which has not been discussed in detail during either meeting – essentially restates an “open site survey” that was rejected on several occasions during these proceedings. *See e.g.* LBP-128-05 at 8 FN47 (“2013 survey methodology was an open site survey...”); *id.* at 24-27. The February 15, 2019 Draft Methodology proposal to conduct a “windshield tour” on the first day, followed by survey of as-yet unidentified transects of “potential areas to be examined” is remarkably similar to the June 5, 2018 open site survey “methodology” forwarded by Dr. Nickens. ML18157A092. The Oglala Sioux Tribe remains willing to work out the details that “open site survey” proposals lack and is encouraged by Mr. Spangler’s February 22, 2019 confirmation that “open site survey” is not a recognized methodology so as to help move negotiations past this long-standing issue.

In conclusion, the March 1 letter expresses “NRC staff’s goal … to collaborate with the Tribes on the working document to elicit, encourage, and understand the Tribes’ input in order to discuss and finalize a site survey methodology.” March 1 letter at 4. The Tribe appreciates this statement and agrees that several challenges must be overcome before the methodology can be finalized. The Oglala Sioux Tribe shares NRC staff’s goal and is committed to working with NRC staff and its contractor to develop a methodology that recognizes and overcomes methodological

challenges. The Oglala Sioux Tribe does not believe that there are such fundamental differences between NRC staff and the Tribes that the efforts should be abandoned. Indeed, at the February 22, 2019 meeting on the Pine Ridge Reservation all of the Tribal Historic Preservation Officers, and the NRC staff's contractor, Mr. Spangler, expressed a strong desire to continue to work to develop a methodology that will result in a competent, culturally-relevant, and NEPA and NHPA compliant cultural resources survey. The Tribe looks forward to the NRC staff response to the Tribes' invitation extended at the close of the February 22, 2019 meeting for a multi-day meeting of the qualified personnel to delve deep into the survey methodology required to reach agreement on the proper methodology. Once a proper methodology is established, reasonable budget and timeline constraints can be addressed, and hopefully resolved amicably, based on the necessary information. The Oglala Sioux Tribe reiterates that sentiment and requests that NRC staff maintain the promised flexibility to allow the process to evolve and develop to everyone's benefit.

Sincerely,

/s/ Jeffrey C. Parsons

Jeffrey C. Parsons
Counsel for Oglala Sioux Tribe

cc:

Ms. Lorraine Bear, U.S. Nuclear Regulatory Commission, Office of General Counsel (via email)