UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	Docket No. 40-8943-MLA-2
CROW BUTTE RESOURCES INC.	)	ASLBP No. 13-926-01-MLA-BD01
	)	
(Marsland Expansion Area)	)	March 25, 2019

INTERVENOR OGLALA SIOUX TRIBE PETITION FOR REVIEW

Pursuant to 10 CFR 2.1212 and 2.341(b)(1), Intervenor Oglala Sioux Tribe ("OST") hereby timely file this Petition for Review of LBP 19-2 issued on February 28, 2019, the interim agency decision, the Memorandum and Order of July 20, 2018, issued by the Atomic Safety and Licensing Board ("ASLB" or "Board"), denying all contentions that challenged various aspects of the NRC Staff's ("Staff") final environmental assessment (FEA) for applicant Crow Butte Resources, Inc. ("CBR") issued in April, 2018 (ML 18103A145) and the interim agency decision, the Memorandum and Order of October 23, 2014 dismissing OST Contention 1 (ML 14295A237). During this proceeding, the matter raised in Contention 1 has been re-lettered and is referred to as Contentions D, L, and M below.

I. Concise Summary.

Pursuant to 10 CFR 2.341(b)(2), OST submits:

(i) A concise summary of the decision or action of which review is sought: OST submits that in LBP-19-2 the ASLBP ("Board") made errors of law and clearly erroneous findings of fact, and abused its discretion, including but not limited to shifting the burden of proof inappropriately to OST, and the mischaracterization of OST's expert witness testimony, as

specified below in Section II.

Memorandum and Order of July 20, 2018: By its Memorandum and Order of July 20, 2018, the Board denied the admission of the following new or renewed contentions pertaining to the FEA:

(1) OST Contention A: Failure of the FEA to Adequately Describe CBR's Cessation of Operations, Proposal to Be Possession-Only License in "Standby Status" and Impacts of Decommissioning.

(2) OST Contention B: Failure of the FEA to Describe the Impacts from the New Restoration Timeline Stated in the Extension Amendment Request (April 3, 2018), including Failure to Describe the Expected Increases in Consumptive Use of Water in Restoration

(3) OST Contention C: Failure of the FEA to Consider All Reasonable Alternatives in Light of Crow Butte Mine Cessation and Decommissioning.

(4) OST Contention D: Failure of the FEA to Include Results of Cultural Survey Approach in Powertech Dewey Burdock.

(5) OST Contention E: Failure of the FEA to Take the Required Hard Look at the Pump Test Data Resulting in a Cascading Lack of Scientific Rigor in Assumption and Modeling Relied on in the Analysis and Evaluation of Potential Impacts from the Licensed Activity.

(6) OST Contention F: Failure of the FEA to Critically Evaluate the Pump Test Data Renders the Analysis and Evaluation of Potential Impacts from Restoration Incomplete and Insufficiently Detailed to Inform the Public.

(7) OST Contention G: Failure of the FEA to Provide an Adequate Baseline Groundwater Characterization or Demonstrate that Groundwater and Surface Water Samples Were Collected in a Scientifically Defensible Manner Using Proper Sample Methodologies.

(8) OST Contention H: Failure of the FEA to Adequately Analyze Groundwater Quantity and Quality Impacts Due to Extended Restoration Timetable and Known Need for ACLs.

(9) OST Contention I: Failure of the FEA to Adequately Analyze Cumulative Impacts that Include Decommissioning of the CBR's Central Processing Facility ("CPF") and Existing Mining Units.

(10) OST Contention J: Failure of the FEA to Discuss or Demonstration Lawful Federal Jurisdiction and Authority over CBR's Activities.

(11) OST Contention K: Failure of the FEA to Obtain the Consent of the Oglala Sioux Tribe as Required by Treaty and International Law.

(12) OST Contention L: Failure of the FEA to Meet Applicable Legal Requirements Regarding Protection of Historical, Cultural, and Spiritual Resources.

(13) OST Contention M: Failure of the FEA to Meet Applicable Legal Requirements Regarding Protection of Historical, Cultural, and Spiritual Resources by Reason of the Failure to Adequately Involve or Consult the Oglala Sioux Tribe as Required by Federal and International Law.

(14) OST Contention N: Failure of the FEA to Take the Requisite "Hard Look" at Environmental Justice Impacts.

The Board ruled as to each that the Contention lacked factual support necessary for an admissible contention pursuant to section 2.309(f)(1)(v) and / or failed to demonstrate a genuine dispute with the FEA on a material issue per section 2.309(f)(1)(vi) and / or per section 2.309(c)(1)(i)-(iii) was not based on previously unavailable information or lacks evidentiary support. Memo, p. 14 (Contention A), 18 (Contention B), 21 (Contention C), 22-23 (Contention D), 23 (Contention E), 27 (Contention F), 28 (Contention G), 30 (Contention H), 31 (Contention I), 33 (Contention J), 35 (Contention K), 37 (Contention L) 39 (Contention N), The Board also ruled that Contentions J and K, and were outside the scope of the proceedings. Memo, pp. 34, 35. And, the Board held that Contentions L and M were untimely. Memo, pp. 37, 38.

(ii) <u>A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not, why they could not have been raised</u>: With respect to issues related to Contention 2, OST could not raise issues that were raised by the Board *sua sponte* at the Hearing or were revealed for the first time in the LBP 19-2 decision. With respect to issues related to Contention 1, OST has consistently raised and preserved for appeal all issues [Tr. at 318].

(iii) <u>A concise statement why in the petitioner's view the decision or action is erroneous</u>: It was an abuse of discretion for the Board in LBP 19-2 to: (A) shift the burden of proof to OST; (B) provide its own evidence where none was in the record and/or assume such evidence in order to make a finding that the NRC had met its burden of proof; and (C) mischaracterize testimony of OST's expert witness Mikel Wireman.

The matters of fact and law as to each of Contentions A through N were raised by OST in The Oglala Sioux Tribe's Migrated, Renewed, and New Marsland Expansion Final Assessment Contentions, dated May 30, 2018 (received May 31, 2018) (OST FEA Contentions) and OST Comments on Draft Environmental Assessment dated January 29, 2018 (OST DEA Comments, received on January 30, 2018) (ML 18046A060).

Further it was an abuse of discretion for the Board to dismiss Contention 1 regarding tribal cultural resources in its October 23, 2014 Memorandum & Order (ML 14295A237). That decision was both a violation of NRC's trust responsibility, as a federal agency, to ensure appropriate engagement with federally recognized tribes and contrary to the ruling in *OST v. NRC*, 896 F.3d. 520, 529, fn6 (D.C. Cir. 2018) finding that tribal cultural resources, while identified by the locally affected tribes are of critical importance

to the public generally and Congress has directed "all agencies of the Federal Government" to protect those values.

(iv) A concise statement why Commission review should be exercised: This Petition for Review should be granted because there are substantial questions of law raised in this proceeding as provided in 10 CFR 2.341(b)(4) (i)-(iv), as described in detail in Section II below.

II. Detailed Explanation of 2.341(b)(4) Issues.

A. 2.341(b)(4)(i) and (ii).

The Board abused its discretion and erred when it shifted the burden of proof to OST. The Board correctly acknowledged that the Applicant bears the burden of proof on safety contentions and that the NRC Staff bears the burden of proof on NEPA contentions; however the Applicant may share that burden if it is the proponent of a particular challenged position in the NEPA document. LBP 19-2 at 16-17. No where in the law or LBP 19-2 is there legal support for the proposition that the OST, as Intervenor, bears any burden of proof once it has met the initial contention admissibility requirements and makes a showing of the challenge. Once the challenge is demonstrated, the OST does not thereafter bear any burden of proof. The burden is entirely on the Applicant and the NRC Staff to prove by a preponderance of the evidence in the record that the challenge must fail.

The Board improperly shifted the burden to the OST many times in LBP 19-2:

1. NEPA's implementing regulations require agencies to: [i]nsure the professional integrity, including scientific integrity of the discussions and analysis in environmental impact statements. 40 C.F.R. § 1502.24. Further, where data is not presented

in the NEPA document, the agency must justify not requiring that data to be obtained. 40 C.F.R. § 1502.22.

The Board imposed on OST witness Wireman the burden to provide evidence justifying the installation of restoration wells to obtain water quality data. LBP 19-2 at 134. Mr. Wireman, as a former EPA scientist, is well qualified to identify where and when baseline sampling should be conducted in order to maximize the potential of protecting the environment and public health. He offered his opinion that baseline is "pre-mining" because once lixiviant has been injected in to the first MEA MU, the chemistry has been altered and the levels will be above pre-mining levels. Mr. Wireman also alleged that where water has been altered in one mine unit, it is unlikely that none of that altered water gets into the next mine unit and suggested the installation of restoration wells to obtain water quality data.

The Board chose to accept the NRC's witness Dr. Stritz' unsupported opinion that it was not possible that there would be movement between mining units, even in restoration. LBP 19-2 at 134. This was despite Dr. Stritz' disclosure that she had seen elevated uranium levels in a pilot ISR study. Therefore, it was possible but the Board accepted Dr. Stritz' position that the event in the pilot study was an outlier and didn't justify installing restoration wells at the MEA. The Board was in error when it did so. The Board should have evaluated the pilot study incident as supportive of Mr. Wireman's position and found that restoration wells should be installed to obtain water quality data from MUs in restoration. The License should have been amended to include such requirement as a license condition. The failure should be corrected by the Commission.

2. The Board erred when it ruled that there are no known faults without any evidence to support that fact. It is impossible to prove a negative. Applicant and the NRC have exclusive access to the MEA and are not inclined to provide evidence that undercuts their own position. OST does not have access to the MEA so the best OST's witnesses are able to offer is that there are fractures in the region and the only way to state with scientific confidence that there are no fractures is to do fracture analysis. This was not done. Rather the Board accepted statements to the effect that no fractures were sought, investigated, or found.

The lack of knowledge of something not sought, investigated or tested for is not evidence of the absence of such thing. The Board erred by accepting Applicant's and NRC Staff's statements that despite regional fracturing that common sense would dictate covers the MEA, Applicant did no fracture testing to obtain scientific confidence that no fractures in fact exist at the MEA. The Applicant and NRC may not be allowed to assume facts and the Board may not accept such assumptions in order to satisfy the burden of proof.

3. The Board improperly shifted the burden of proof to OST when it required that OST provide evidence to establish the need for pumping tests on all 11 of the MEA MUs, as opposed to the 4 covered by the May 2011 test. LBP 19-2 at 179.

B. 2.341(b)(4)(i), (ii) - Other Erroneous Findings of Fact; Errors of Law.

The Board noted that OST expert Mr. Wireman testified that all baseline sampling should be conducted before any ISR operational extraction occurred at Marsland. LBP 19-2 at 133. The Board created a new standard for baseline that "It is at best questionable that water quality data should be obtained before ISR operations begin." LBP 19-2 at 135, citing

Strata Energy, Inc. (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 583–84 (2016), petition for review denied sub nom. *Nat. Res. Def. Council*, 879 F.3d at 1214. This is a misreading of CLI 16-13 which supports the proposition that an applicant's groundwater monitoring (on which the FSEIS relied) which did not conform to post-licensing monitoring or other, more rigorous, procedures did not undermine the sufficiency of the site characterization *per se*.

Nothing in CLI 16-13 supports the proposition that obtaining water quality data as a baseline before ISR operations begin is required for site characterization. The question in Strata was whether the data gathered was sufficient (in that case 362 groundwater samples with 16,000 chemical and radiological parameters)[1]; not whether the data was required to be gathered and included in the NEPA analysis.

OST submits that Mr. Wireman's view is correct and is supported by CLI 16-13 which simply ruled that the Board in Strata had the discretion to determine whether the number of samples was sufficient.

In Mr. Wireman's view before any operations have begun anywhere within the MEA, because once lixiviant has been injected into the first MEA MU, the BC/CPF chemistry (specifically oxidation levels) has been altered and there are no longer "background" levels in the aquifer. - meaning of 'baseline' as pre-mining. The Board erred when it found that "it is suitable to wait to install and sample these restoration wells as each MU is developed." LBP 19-2 at 135.

[1] CLI-16-13 at 25.

C. 2.341(b)(4)(iv) Re: Board Assumptions of Evidence Not in Record.

The Board erred by requiring OST to prove a negative. The Board acknowledged that the Applicant's witnesses maintained there is no evidence of a fracture in the MEA that is sufficiently transmissive to serve as a contaminant pathway. LBP 19-2 at 98. The Board was aware that there was no testing or analysis of fractures and only limited pump testing at the very large MEA. So there is no evidence that there are no fractures. There is no evidence that fractures likely to exist are not sufficient to transmit contaminants. There is only the unsupported opinion of CBR witnesses to that effect noted on p. 98 of LBP 19-2. It was an abuse of discretion for the Board to provide its own evidence in the decision that was not in the record and/or assume the existence of such evidence in order to find against OST. This error should be corrected by the Commission.

D. 2.341(b)(4)(i), (ii), (iv) Re: Issuance of License prior to final agency ruling on safety and environmental contentions.

Once again in this case, the Board upheld NRC Staff's decision to issue the license amendment prior to the evidentiary hearing and well in advance of the final agency determination, presumably in accordance with NRC regulations specifically 10 C.F.R. § 2.1202(a). The agency has again placed itself clearly at odds with NEPA's dictate to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). It bears repeating the equally specific directive from the U.S. Supreme Court that the information-forcing aspect of NEPA is intended to require that agencies have all the relevant information "to focus the agency's attention on the environmental consequences of a proposed project…[before] resources have been committed or the die otherwise cast." *Robertson v.*

Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); *see also NRDC, et.als. v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018) and *OST v. NRC*, 896 F.3d 520 (D.C. Cir. 2018).

The issuance of a source materials license and/or amendment by NRC immediately registers on a mining company's shareholders report and stock price, thus casting the die on the outcome of the evidentiary hearing and allowing the Applicant (now "Licensee") to argue that revocation or restriction of the license would cause it economic harm. This subverts NEPA's declared purpose, flies in the face of Supreme Court and Appellate Court precedent and is ultimately a disservice to both Intervenors and Applicants/Licensees by breeding uncertainty. If the Board is correct in ruling that issuing a license prior to the final ruling on admitted contentions is in accordance with NRC regulations, then those regulations are not in accordance with NEPA and the agency should immediately institute rulemaking procedures in order to harmonize its internal regulations with applicable federal law.

III. Detailed Explanation of 2.341(b)(4) Issues Re: Memorandum & Order July 20, 2018.

CONTENTION J: NEPA requires a demonstration in the FEA of compliance with all applicable law. On Contention J, the Board erred in ruling that it had jurisdiction over the MEA license application as the MEA and the natural resources subject to the license are located on lands within the territory of the OST through the Očhéthi Šakówiŋ (the Great Sioux Nation), a sovereign nation predating the United States, secured to the Tribe by the Ft. Laramie Treaties of 1851 and 1868 (the "Unceded Lands"). Article V of the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749; Article XVI of the Fort Laramie Treaty of 1868, 15 Stat. 635. It has the inherent right, and right by treaty, to exclude non-

members from its territory; and its right to regulate activities by non-members within its territory has been recognized by treaty and by the United States Supreme Court. *See*, *Montana v. U.S.*, 450 U.S. 544, 564 (1981); *Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 2019 WL 1145150, *1 (9th Cir. 2019). Objections to subject matter jurisdiction can be raised at any time in a proceeding. *Sebelius v. Auburn Reg'l Med. Center*, 568 U.S. 145, 153 (2013).

Under international law, compliance with a nation's internal law cannot be used as a defense to a violation of an international law. Restatement (3rd) of the Foreign Relations Law of the United States, §115(1)(a) (1987); *Dann v. United States*, IACHR Case 11.140, Report No. 75/02, Doc. 5. 1 at 860 (2002), ¶s 171 and 172.

Commission review should be exercised on this Contention because the Board's decision authorized a violation of treaties and the territory of a sovereign entity and is an exercise of authority over territory, land, and resources that it does not possess as a matter of law.

CONTENTION K: The Oglala Sioux Tribe has never consented to the activities of CBR within its Treaty territory. It is possessed by law of the right of free, prior, and informed consent to all activities, particularly those that impact its territory, lands, natural resources, and water, within its territory. Ft. Laramie Treaty of 1851; Ft. Laramie Treaty of 1868, Articles II and XVI; ILO Convention 169, art. 6, sec. 2 and art. 26, sec. 2 (1989); International Convention on the Elimination of All Forms of Racial Discrimination, UN GA Res. 2106(XX) (1965) (UN OHCHR Gen. Recommendation No. 23, ¶5; articles, 10 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples (2007);

articles XIII, sec. 2, XXIII, sec. 2, XXVIII, sec. 3, XXIX, sec. 4 of the American Declaration on the Rights of Indigenous Peoples (2016). The Board's decision violates the Oglala Sioux Tribe's inherent and sovereign right to consent recognized and secured by international law and the aforesaid treaties signed and ratified by the United States.

The Commission should exercise its review to avoid this violation of international law, the sovereignty of the Oglala Sioux Tribe, and of the collective human rights of the Tribe and its people.

CONTENTIONS D, L, and M: As to related Contentions D, L, and M, the Board's decision is in error because the FEA 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 and "hard look" of either the affected environment or the impacts of the project on archaeological, historical, and traditional cultural resources, including non-tangible historic, cultural, and spiritual interests of Native peoples such as the Očhéthi Šakówiŋ, the OST, and the Oglala Lakȟóta Oyate. OST submitted expert opinions on the deficiencies of the The OST submitted expert testimony describing substantive deficiencies in the NHPA Section 106 survey of the MEA. Further, the assessment of these resources within or nearby the MEA was made with, at the same time, and using the identical methodology and scope as that used by the NRC Staff for both the renewal of the CPR license (the "Renewal" proceeding) and for another ISR facility, Powertech, also opposed by OST.

Following an extensive evidentiary proceeding and hearing on this methodology and scope in the ISR Renewal license, the Panel for the Board in that proceeding found and

held that the methodology and scope utilized by the NRC Staff failed to satisfy NEPA's "hard look" requirement that requires more than mere satisfaction of the NHPA consultation requirement, particularly as to "non-tangible" cultural and spiritual interests of the Tribe. *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. A similar ruling was made by another Panel for the Board in Powertech which was confirmed by the Commission on appeal. *In the Matter of Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility*), 84 N.R.C. 219, 249 2016 WL 9460000 (CLI-16-20) (December 23, 2016) ("*Powertech*, Commission Decision").

Commission review should be exercised on these Contentions because they concern highly significant, sacred, interests of the OST and its people in the historical, cultural, and spiritual resources, including the right of access of the OST and its people to those resources, contained in or near the MEA which are place at risk of disturbance or destruction if the ISR mining were to proceed.

CONTENTION N: As to Contention N regarding the FEA's treatment and analysis of environmental justice impacts, the Board ignored the fact, acknowledged in the FEA discussion of the history of the MEA area as within the treaty and ancestral territory and lands of the OST and the Sioux people, that the OST and its people possess historic, cultural, and spiritual interests in the MEA and surrounding area that are unique to them such that the infringement upon, disturbance of, or destruction of those interests by the proposed ISR mining by CBR at the MEA, would have an disproportionate impact upon them as compared with the non-Sioux population in the area. This is precisely the interests

that the Board panels, and the Commission, in both *Powertech* and the CBR License Renewal concluded were not sufficiently addressed in the FEA under NEPA.

Again, Commission review should be exercised on this Contention because it concerns not only the fair and equal protection of Native interests in the MEA but also the highly significant, sacred, interests of the OST and its people in the historical, cultural, and spiritual resources, including the right of access of the OST and its people to those resources, contained in or near the MEA which are place at risk of disturbance or destruction if the ISR mining were to proceed.

CONTENTIONS L, M, N - Timeliness / Preservation: The Board ruled that Contentions L, M, and N were untimely submitted or not preserved in the DEA. OST respectfully asserts that the Board misapprehended 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 a related Crow Butte proceeding, 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 [ML 18046A060] and, upon issuance of the Final EA, submitted its NEPA-based contentions at the first available opportunity to do so. The Commission further explained, "Even had intervenors proposed their contentions earlier, the hearing could not take place until the Staff's environmental review was complete." *Id.* Therefore, the Commission should reject the assertion that the Contentions are untimely due to failure to assert them before the final EA was published.

This further places administrative form and procedure over substance and substantive rights and equity. The historical, cultural, and spiritual interests of the Sioux people and the OST contained in these contentions were raised at the time OST first intervened as Contention 1 in this matter over 6 years ago. Petition to Intervene and Request for hearing of the Oglala Sioux Tribe, January 30, 2013. All of these matters were included in OST's comments to the Draft EA of January 29, 2018 [ML 18046A060], submitted prior to the FEA and clearly meant to be considered by the NRC Staff in its preparation of the FEA. These "comments" are identical to the "contentions" and to reject them simply because they were submitted, shortly prior to the DEA contention submission deadline, as comments works an injustice which opens up the Tribe to violations of its sovereignty and its territory and its treaties, and to potentially severe harm to its historical, cultural, and spiritual interests in the Marsland Expansion area. OST is not just any party. It is a sovereign indigenous nation possessing by law a nation-to-nation, government-to-government, relationship with the United States and recovering from hundreds of years of the denial of its rights and the taking and exploitation of its territory, lands, natural

resources, and water under colonial rule which left it the most impoverished area of the United States.

For these reasons, the Boards rulings on timeliness and preservation were unreasonable and arbitrary, an abuse of discretion, and unsupported by law and deserves the review of the Commission.

IV. Detailed Explanation of 2.341(b)(4) Issues Re: Memorandum & Order of October 23, 2014.

As an agency of the Federal Government, the NRC bears a trust responsibility in its dealings with tribal nations. *See generally, California Valley Miwok Tribe v. United States*, 515 F.3d 1262 (D.C. Cir. 2008). Between the time that its Motion to Intervene was granted in 2013 and the Memorandum & Order dismissing Contention 1 was issued in 2014, the OST was without counsel on the MEA case. This should have been clear to both NRC Staff and the Board, when the OST did not respond to the issuance of the draft EA regarding cultural resources, nor to NRC Staff's Motion to Dismiss Contention 1.

OST is currently an Intervenor in 5 pending licensing actions before the NRC involving lands within historic tribal territory. In each case, the OST has raised concerns about protection of its historic and cultural resources and has actively advocated for their protection, relying entirely on pro bono counsel as the time and expertise required to litigate within the confines of NRC regulations is beyond the scope of the Tribal Attorney's office. The very same individuals on NRC Staff meet, confer and discuss with the same OST Tribal Historic Preservation Office and Tribal Council in every case. It is not a tenable position that NRC was not on notice that OST was, and is, concerned with protection of its

cultural resources at the MEA site and requires at least as detailed a cultural resources survey as is being developed in the Dewey-Burdock case. [40-9075 – MLA].

While the dismissal may have been in accordance with NRC regulations and rules of practice, it failed to safeguard the Tribe's demonstrated interest in identifying and protecting its cultural resources. *See, Quechen Indian Tribe of the Fort Yuma Reservation v. United States Dep't of the Interior*, 547 F.Supp.2d 1033, 1118 (D. Ariz. 2008) (agency communications "replete with recitals of law (including Section 106), professions of good intent, and solicitations to consult … do not, by themselves, show [the agency] actually complied with the law."); *see also, Slockish v. U. S. FWHA*, 682 F.Supp.2d 1178 (D. OR 2010) ("by failing to include key stakeholders in the process (the agency) may have acted without information necessary for them to comply with their obligations under [the NHPA]"); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

As the Court of Appeals for the D.C. Circuit recently reminded in *OST v. NRC*, while tribal cultural properties may belong to tribes and be best identified by tribes, the interest in their protection and preservation is not confined to the tribes themselves but their protection is of "high order" and a responsibility owed, by operation of NEPA, from the agency to the public generally. *OST v. NRC*, 896 F.3d at 529. Accordingly, the OST must be involved in a cultural resources survey of the MEA site to adequately inform NRC Staff about the identification and location of cultural resources in the area prior to any

conclusions being drawn by the agency as to the sufficiency of their protection.

Conclusion

The Petition for Review should be granted for the reasons set forth above.

Dated this 25th day of March, 2019.

Respectfully submitted,

FOR THE OGLALA SIOUX TRIBE:

Signed (electronically) by David Frankel

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CROW BUTTE RESOURCES INC.	)	ASLBP No. 13-926-01-MLA-BD01
	)	
(Marsland Expansion Area)	)	March 25, 2019

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: March 25, 2019.

Signed (electronically) by David C. Frankel

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