

**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))	April 29, 2019

OGLALA SIOUX TRIBE’S REPLY IN SUPPORT OF ITS PETITION FOR REVIEW

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OGLALA SIOUX TRIBE'S REPLY IN SUPPORT OF ITS PETITION FOR REVIEW

Pursuant to 10 CFR 2.341(b)(1), the Oglala Sioux Tribe ("Tribe" or "OST") hereby submits to the Nuclear Regulatory Commission ("NRC") this Reply in Support of Its Petition for Review (March 25, 2019 ("Petition")) of the final agency decision, the Initial Decision of 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.'s ("CBR") licensed issued in April, 2018 (ML 18103A145), and the interim agency decision, the Memorandum and Order of October 23, 2014, dismissing OST Contention 1 (ML 1429A237).

The numerous cases currently pending before the NRC where the Tribe is an Intervenor do not exist in a vacuum. The Tribe has consistently asserted its interest in identifying and protecting its cultural resources within the entire expanse of its historic treaty territory. The Agency owes not just the Tribe under its trust responsibility, but the American public generally under NEPA, a comprehensive protocol designed to incorporate tribal participation in the identification and protection of these resources on proposed ISL mining areas. It is a mistake for the NRC to assume that shirking this duty based on the strict application of its unquestionably Byzantine procedures will assuage the Tribe and lead it to acquiesce its concerns.

In their Responses to the Petition for Review, both the NRC Staff and CBR either avoid or attempt to diminish the essential nature of the Oglala Sioux Tribe as party to this proceeding, the history of the Tribe's efforts to protect its interests in its treaty territory, and the equities raised by

the Tribe in its Petition as to Contentions D, J, K, L, M, and N.¹ The Tribe is not a concerned individual, an interested property owner, an environmental group, or a corporation. By settled law, it is a sovereign nation and member of the Očhéthi Šakówiŋ (the Great Sioux Nation), predating the establishment of the United States, continuously occupying its ancestral territory whose rights thereto have been acknowledged and guaranteed by sacred treaties between it and the United States, including the Ft. Laramie Treaties of 1851 and 1868. *See, Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014); Fort Laramie Treaty of September 17, 1851, 11 Stat. 749; Fort Laramie Treaty of 1868², 15 Stat. 635. The relationship between the United States and the Tribe is more than "government-to-government" such as that between the United States and one of its states or municipalities, but is a relationship between sovereign nations, "nation-to-nation." *Id.*; Executive Order 13647 (June 26, 2013); TRIBAL PROTOCOL MANUAL, US NRC (rev'd 2017 / 82 FR 2402), p. vii ("The U.S. Regulatory Commission (NRC) recognizes the unique relationship that the Federal Government has with Federally recognized Tribes. ...The manual explains that Tribes are unique governmental entities and *are not extensions of State or local governments. Each Federally recognized Tribe is a domestic, dependent sovereign nation...*"),

¹ During this proceeding, the matter previously raised in Contention 1 has been re-lettered and is referred to as Contentions D, L, and M below.

² Which, coincidentally, was signed 151 years ago today. The unilateral abrogation of that treaty by the United States seven years later under the notorious "Sell or Starve" program of extortion resulted in one of the longest federal court cases in history. In ruling for the Great Sioux Nation after 60 years of litigation, the U.S. Court of Claims, wrote of the treaty abrogation that, "a more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history." The Supreme Court upheld the Court of Claims finding, but rather than granting specific performance as is generally appropriate in cases involving real property, awarded monetary compensation for the stolen lands, including the proposed MEA. The seven Lakota tribes involved in the litigation, including the Tribe, continue to refuse to accept the monetary settlement and hold onto their belief that justice will ultimately be served and the land returned. The connection to these treaty lands is a defining characteristic of every Lakota and helps to explain the depth of the Tribe's interest in protecting its cultural heritage.

also, p 1 ("Tribal officials expect to be treated as sovereign nation representatives when interacting with the Federal Government."). ML18214A663 (emphasis supplied). This relationship has been recognized and enforced by US courts for almost 200 years. *See, Worcester v. State of Georgia*, 31 U.S. 515, 549, 555 (1832). The NRC Staff and CBR also fail to respond to the Tribe's treaty assertion that the lands upon which the activity is proposed lie within the Unceded Lands expressly retained from cession by the Tribe in the 1851 (Article V) and 1868 (Article XVI) Ft. Laramie Treaties and therefore remain under the sovereignty and jurisdiction of the Tribe regardless of ownership of the land itself. *See, Montana v. U.S.*, 450 U.S. 544, 564 (1981).

The NRC Staff and CBR ignore or attempt to diminish the unique history, ancestral, cultural, and spiritual ties that the Tribe and its members have to this territory which make the Tribe's full participation in the assessment of historic and cultural resources, under either NHPA or NEPA, and the environmental justice assessment under NEPA, absolutely indispensable. Related to this, both also diminish the Tribe's decades long history in demanding the protection of these historic, cultural, and spiritual interests in the Crow Butte area from CBR's activities. *See, e.g., In the Matter of Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), 68 N.R.C. 691 (2008). The Tribe filed its Petition to Intervene in this proceeding regarding the Marsland Expansion Application on these very issues on January 30, 2013 - over 6 years ago and renewed its concerns on January 29, 2018, in the Tribe's timely comments to the Marsland Draft EA [ML18046A060] and again in its May 30, 2018 Contentions on the Marsland Final EA. During that time, the NRC Staff's assessment of these interests for the Marsland Expansion had been lumped together with the same assessment of these interests in the neighboring Crow Butte License Expansion Area, and in another site, Powertech, in the Black Hills, such that the defects in the procedure and assessments the Board in each found as to those areas were / are identical to those

in Marsland. See, *In the Matter of Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska)*, 83 N.R.C. 340, 389 (May 26, 2016); *In the Matter of Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility)*, 84 N.R.C. 219, 249 (December 23, 2016); also, *Oglala Sioux Tribe v. U.S.N.R.C.*, 896 F.3d 520 (D.C. Cir. 2018).

The agency in exercising its power to deny or to accept and hear the Tribe's contentions is not bound entirely by technicalities of procedure, as the NRC Staff and CBR would have it, but must be made in context, including: the nature of: the parties, here a sovereign nation with treaty guaranteed territorial claims and unique and highly significant and indispensable interests in the area under consideration, the United States with a trust responsibility to the Tribe subject to its exercise of plenary authority; the history of the litigation, here with the Tribe having expressed its concerns on these issues for decades; and, the equities - the Tribe as from one of the most impoverished areas of the country having previously lost its counsel and then having to rely upon pro bono counsel and having timely asserted its interests, its Contentions, in its comments to the draft Marsland EA.

The agency is required by law to act reasonably and not arbitrary or capricious. 5 U.S.C. §706. Under these compelling circumstances, the Tribe's Petition for Review must be granted.

Dated this 29th day of April, 2019.

FOR THE OGLALA SIOUX TRIBE:

Signed (electronically) by David Frankel

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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 REPLY IN SUPPORT OF OGLALA SIOUX TRIBE'S PETITION FOR REVIEW were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: April 29, 2019.

Signed (electronically) by David Frankel

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