

NATIVE



JUSTICE

45 YEARS OF FIGHTING FOR THE RIGHTS OF INDIGENOUS PEOPLES WORLDWIDE

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Admitted: Inter-American
Commission on Human Rights;
United States Supreme Court;
US Circuit Courts (7, 8, 10);
Supreme Courts of Colorado,
Nebraska, and South Dakota

July 26, 2022

US Nuclear Regulatory Commission Staff
Attn: Jean Trefethen, NEC Environmental Project Manager
Jean.Trefethen@nrc.gov; Marcia Simon, Marcia.Simon@nrc.gov;
Lorraine Baer, Lorraine.Baer@nrc.gov

Re: Crow Butte Resources, uranium source materials license renewal, OST review of proposed draft Supplemental Environmental Assessment

Dear Ms. Trefethen and Counsel:

Per the agreement of the parties, the Oglala Sioux Tribe (OST) has had the opportunity to review the proposed draft of the US Nuclear Regulatory Commission's (NRC) Staff (Staff) Supplement Environmental Assessment (SEA) for the License Renewal of US NRC License Number SUA-1534 for the Crow Butte Resources, Inc. (CBR) *In-Situ* Uranium Recovery Facility in Dawes County, Nebraska provided by Jean Trefethen to OST by email attachment on June 29, 2022. OST appreciates the opportunity to comment upon the proposed draft SEA OST submits the following comments upon the proposed draft SEA to help avoid / resolve potential disputes or other issues that OST may have with the draft before it is finalized and issued for public comment:

- As a general comment, it is our understanding that the SEA was prepared primarily by contract with Mr. Jerry Spangler, an archeologist with Unita Research LLC (ML19011A460). It is our understanding that Mr. Spangler is not a member any Lakota peoples or nation or any Native peoples or nation, is not an expert on Lakota culture, traditions, history, or spirituality, is not fluent in Lakota, while possessing a degree in anthropology, professionally limits his work to archaeology and is not

professionally a cultural anthropologist or anthropologist or historian, and did not employ in this work any Lakota or Native peoples or persons knowledgeable of Lakota language, culture, traditions, history, or spirituality and did not conduct his own field or cultural survey of the CBR license area. The Board's Partial Initial Decision (ML16147A587) of May 26, 2016 (PID), noted the inadequacies of qualifications of surveyors lacking such knowledge. *See, eg,* PID, 62-65 (surveyor cultural bias), 64 (Eurocentric bias in literature), 64-65 (inadequacy of literature to specific area), 65-66 (inability of literature "to 'ascribe a cultural meaning' to a TCP "that the Lakota people would" – thus, requiring the NHPA Section 106 survey to be conducted in direct consultation with Lakota cultural experts), 66 (lack of surveyor Lakota historical knowledge – again, thus requiring direct consultation with Lakota historians), 68, 71 (surveyor failure to enlist in the survey anyone with Lakota expertise) 79-80 ("Surveyors Were Inappropriate for the Task")

The PID at 67-68 concludes on this:

The ACHP Guidance goes on to explain that the "reasonable and good faith effort" required of each federal agency envisions specific identification carried out by qualified individuals who "have a demonstrated familiarity with the range of potentially historic properties that may be encountered, and their characteristics," and who acknowledge "the special expertise possessed by Indian tribes . . . in assessing the eligibility of historic properties that may possess religious and cultural significance to them."

This – the conducting of the survey with teams consisting of spiritual advisors and elders - was also specifically noted in the OST testimony at the hearing on this license renewal. PID, 77-78. As the Board remarked: "Dr. Nickens, the NRC Staff's own expert, actually acknowledged that a more structured process, with the involvement of tribal elders is a better TCP survey approach. He further stated [a]and I agree with [Mr. CatchesEnemy] that a proper TCP survey, as I've stated previously, involves elders and bringing the elders to the field as possible and so forth." PID, 78.

Further, the Board noted as to the Staff's NEPA obligations:

The NHPA and NEPA both impose procedural steps to improve agency decisionmaking, and many of the NHPA's requirements overlap with those of NEPA. Of particular importance here, NEPA requires each federal agency to undertake a "hard look" at

the *environmental impacts* of each major federal action—which would include impacts of license renewal on TCPs. Satisfying NEPA means satisfying, at a minimum, the NHPA’s Identification Obligations, and even *going further* in certain cases. For example, NEPA requires a look at *intangible*, not just tangible properties, and *it is not limited to a focus on historic properties in the same way as the NHPA*. ...[T]he EA also indicates that short shrift was given to a review of tangible *and intangible* TCPs that do not rise to the level of historic properties under the NHPA.

PID, 84, 85 (emphasis provided). Those “intangible” interests of the Lakota peoples and OST that were raised in this proceeding to which the Board was referring, including all of OST’s written submissions and evidentiary hearing testimony, included its political, historical, cultural, and spiritual interests potentially impacted by the license renewal of CBR’s activities.

The Board and the parties in the Survey Methodology and in the Report have recognized that Lakota people and OST are uniquely qualified to identify their own interests that may be impacted by the activities in the licensed area. OST acknowledges that this latter NEPA component, as well as the Board’s emphasis on necessary reliance on Native expertise and knowledge, has broken new ground in what was traditionally an exclusive agency task generally limited to NHPA compliance and the identification of tangible TCPs eligible for Register listing.

The Methodology protocol agreed to by the parties that provides for OST and Lakota experts to fully participate in the survey and identify its own tangible and intangible interests, with the applicant covering the reasonable costs of the survey, and then providing this information to the NRC Staff for use in the preparation of the SEA, breaks new ground that provides greater respect for and protection of Native people, nations, and interests. OST recognizes that this new approach requires a transition / retraining of archaeologists and those that engage in NHPA / NEPA surveys and the agency staff who engages in preparation of EAs to fully comply with NHPA and NEPA as applied and interpreted by the Board in its decision.

Thus, the Contention 1 Supplemental EA must be twofold: (1) an appropriate, competent, and sufficient good faith NHPA Section 106 field survey of the license area to identify TCPs eligible for listing in the National Register; and (2) a sufficient, competent, and complete “hard look” at the potential environmental impacts by the CBR renewed licensed activities upon all of the interests of the Lakota people and the Oglala Sioux Tribe,

among those of other Native peoples and nations. This encompasses not only the potential impacts upon the eligible – and ineligible – TCPs identified in an adequate Section 106 survey but also the impacts on any other interests of OST and / or the Lakota peoples, including their tangible and *intangible* interests / properties such as their intangible political (ie, treaty), historical, cultural, and spiritual interests irrespective of what is required by the NHPA.

Upon review of Mr. Spangler's vitae (ML19011A460), it would appear that his primary experience is limited to NHPA field surveys, not the NEPA hard looks at the impacts upon all the tangible and intangible interests of Native peoples and nations. I would venture to say, without questioning Mr. Spangler's good intentions, that his work and professional experience (and perhaps that of the NRC Staff as well) creates a perhaps subliminal bias towards the NHPA surveys and against the NEPA hard look and that the proposed draft SEA reflects that and gives as the Board stated "short shrift" to the non-Register-eligible TCPs and other tangible and intangible interests of the Lakota peoples and OST. As a general comment, the draft SEA fails to adequately and fully address all of the non-Register-eligible TCPs and the tangible and *intangible* interests of the Lakota peoples and OST.

These comments are made in good faith in an attempt to protect as fully as possible the interests of the Lakota peoples and OST, as well as that of other Native peoples and nations, and to avoid potential issues and disputes over the draft SEA that could be corrected at this stage in the proceedings. We want to provide the NRC Staff with an opportunity to revise its draft before it is finalized to correct the problems / deficiencies described in these comments.

- Regarding specific deficiencies in the proposed draft SEA, it ignores and wholly fails to take any look, let alone a hard look, at the interests of the Lakota peoples and OST elaborated by OST on pages 2 and 3 of the QSI Report (Report). There are few interests less important to OST and the Lakota peoples than their historical, cultural, and spiritual attachment and Treaty rights to their ancestral lands which include the CBR license renewal area as part of the Unceded Lands of the 1868 Ft. Laramie Treaty. Throughout this proceeding, OST, as a member of the Oceti Sakowin Oyate (the Great Sioux Nation), has asserted its Treaty claims to this territory, challenged the asserted unlawful colonial jurisdiction of the United States and the NRC over it, and objected to the invasion of its territory, the theft of its natural resources and water, and the contamination and desecration of its sacred lands and relatives, by CBR and its predecessors under license by the United States.

This negatively impacts not only the tangible (lands and territory) and intangible (sovereign) political interests of the Lakota peoples and OST, but also the tangible and intangible historical and cultural (the Lakota peoples / OST obligation to protect and care for the lands of their ancestors), and spiritual (the Lakota peoples / OST obligations to care for their ancestors, sacred sites, and Unci Maka (Grandmother Earth)) interests of the Lakota peoples and OST. In violation of Lakota law (wóopñe), the 1851 and 1868 Ft. Laramie Treaties, and binding international law, the United States has exercised and continues to exercise the unlawful colonial ruler over and occupier of the license area. The United States and its agencies are required to get the “free, prior, and informed consent” from the Lakota peoples and OST before it can authorize an invasion of Oceti Sakowin Oyate territory, the theft of Oyate resources and wealth, the destruction of Oyate lands and water, or the approval or renewal a license for CBR’s activities. OST has not only refused to give such consent but has actively opposed this invasion, mine, contamination, and theft since its inception over 40 years ago.

None of these tangible and intangible interests of the Lakota peoples and OST were addressed in the proposed draft SEA and it therefore remains in non-compliance with NEPA as well as Lakota, United States (the 1851 and 1868 Treaties), and international law. An proper environmental assessment requires a discussion as to whether or not the agency action and the activities being licensed are or are not in compliance with any and all laws.

- Section 1.1 of the SEA (page 1, last paragraph) misstates the Board’s decision when read with SEA’s definition of an “archaeological site” at Section 2.1 (as limited to “tangible” remains – see subsequent comment on this), the reference at Section 2.3.4 (page 11, last paragraph in section, limiting the survey to “tangible” artifacts), and 3.2 (page 14, first paragraph in section, that “TCPs are limited to tangible properties”). The Board’s decision found that the EA was insufficient under NEPA because it failed to take a hard look at the “environmental impacts” on the all of the interests of the Lakota peoples and OST - not just the “tangible” TCPs eligible for Register listing, but at all tangible and intangible interests – not just tangible TCPs. “NEPA requires each federal agency to undertake a “hard look” at the *environmental impacts* of each major federal action. ...NEPA requires a look at *intangible*, not just tangible properties, and *it is not limited to a focus on historic properties in the same way as the NHPA*. ...[T]he EA also indicates that short shrift was given to a review of tangible *and intangible* TCPs that do not rise to the level of historic properties under the NHPA.” PID, 84.85.

In other words, the focus of a proper NEPA review is on all potential environmental impacts, including the potential impacts on all interests of OST and the Lakota peoples as part of the environment, of which impacts on the existence of tangible artifacts (TCPs) is only a part. Limiting the definition of sites to those with “tangible remains,” and the considerations of the interests to “tangible artifacts,” and TCPs to “tangible properties,” conflicts with the NEPA obligations set forth both in NEPA and the Board’s decision, and it further demonstrates a lack of a full and fair comprehension of the SEA authors of the scope and importance of such intangible interests to the Lakota peoples and OST. Despite the clear language of the Board’s PID, nowhere in the entire document does the SEA use the word “intangible” or identify and fairly and fully describe those NEPA interests let alone the potential impacts upon them posed by the license renewal and the licensed activities. The SEA improperly conflates the NHPA field survey process and National Register eligibility analysis with what should be a separate NEPA environmental impact analysis. NEPA interests are not limited to just “TCPs” let alone only tangible interests. For that reason, the description of the Board’s ruling at 1.1 is both inaccurate, misleading, and internally conflicting.

- Section 2.0 – should properly state as to the “tribal cultural survey”: “undertaken under contract with OST by Quality Services, Inc. (QSI) to identify sites of historic, cultural, and spiritual significance to the Oglala Sioux Tribe and the Lakota peoples.”
- Section 2.3 – should read: “In April 2022, the Tribe provided a report prepared by QSI on the results of...” The roles of OST and QSI should be distinguished here. OST did not do the survey, but rather contracted for and provided assistance to the contractor as needed (ie, Lakota experts, historians, elders) and then supplied to the NRC Staff the report prepared by the contractor. OST did not prepare the report or conduct the NHPA or NEPA surveys.
- 2.3.1 – same. Where it refers to “The Tribe” it should properly read “QSI” or “The Report”... Page 5, section paragraph 1, line 1; section paragraph 2, lines 1 and 6. Page 6, section paragraph 3, line1; section paragraph 4, line 1, section paragraph 5, lines 1 and 2. Page 7, section paragraph 6, lines 2 and 6; section paragraph 7, line 5; section paragraph 8, line 5, footnote 6, line 1.
- 2.3.2 – same. Page 9, section paragraph 1, line 1.
- 2.3.3 – same. Page 10, section paragraph 1, lines 1 and 2.

- 2.3.4 – same. Page 10, section paragraph 1, line 1. Page 11, section paragraph 1, line 3.
- 2.3.5 – same. Page 10, section paragraph 1, line 1.
- 3.0 – same. Page 12, section paragraph 4, line 1. Page 13, section paragraph 5, line 3.
- 3.1 – same. Page 13, section paragraph 1, lines 1 and 2; section paragraph 2, lines 1 and 3; section paragraph 3, lines 2, 4, 6, 8; section paragraph 4, lines 1 and 6. Page 14, section paragraph 5, lines 1 and 9; section paragraph 7, lines 1, 3, and 7.
- 3.2 – same. Page 14, section paragraph 1, line 1; section paragraph 3, lines 2 and 4. Page 15, section paragraph 4, line 1; section paragraph 5, line 2.
- 3.3 – same. Page 15, section paragraph 1, line 2; section paragraph 2, line 3; footnote 8, line 1.
- 3.4 – same. Page 16, section paragraph 3, line 1; section paragraph 5, line 2.
- 3.5 – same. Page 16, section paragraph 1, lines 1, 2, and 4; section paragraph 2, line 1; section paragraph 4, line 4.
- 3.6 – same. Page 17, section paragraph 1, line 1; section paragraph 2, lines 1 and 5.
- 4.2 – same. Page 19, section paragraph 1, line 4.
- 4.2 – same. Page 19, section paragraph 1, line 4.
- 4.3.1 – same. Page 19, section paragraph 1, lines 1, 2, and 5.
- 4.3.2 – same. Page 20, section paragraph 2, lines 1 and 2.
- 4.3.3 – same. Page 20, section paragraph 1, line 1; section paragraph 3, line 1.
- 4.3.4 – same. Page 21, section paragraph 1, line 1; section paragraph 2, line 1; section paragraph 3, line 5.
- 4.3.5 – same. Page 22, section paragraph 1, line 1; section paragraph 2, line 2.

- 4.3.6 – same. Page 22, section paragraph 1, line 1; section paragraph 4, line 1; footnote 10, lines 1, 2 and 4.
- 4.5 – same. Page 23, section paragraph 1, lines 5 and 7; section paragraph 3, lines 8-9; section paragraph 4, line 5.
- 4.6 – same. Page 34, section paragraph 1, line 4.
- 2.2 – The description in the first section paragraph of the Survey Methodology should note the Board's, the Survey Methodology's, and the Report's, recognition that OST and the Lakota peoples are uniquely qualified to identify the interests potentially impacted by the license renewal.
- 3.4 – Page 16, section paragraphs 3 and 4. The SEA writes off three creeks Lakota elders identified as “would have” significance as lacking in sufficient information from the elder interviews to make that determination and that the water ways are not relevant to the survival of Lakota cultural [and spiritual?] practices “given that the Lakota people have been denied access since the 1880s” – when the territory was wrongfully and unlawfully stolen from them by the United States. It is the NRC Staff's obligation to make sure that it has made a good faith effort to obtain sufficient information to make the NHPA determinations. For example, the NRC Staff contacted CBR for additional information it needed to prepare the SEA on the nature of any potential impact from CBR activities on specific sites. See, CBR Response of June 23, 2022. It would not have been difficult for the NRC Staff to contact OST and / or QSI for follow up interviews with the mentioned Lakota elders to obtain the information the Staff indicated it needed to make the determination on significance and to determine whether or not that significance was compromised by the denial of access. As the Board stated in its Decision, compliance with the NHPA requires a “genuine, reasonable effort” to identify TCPs. NRC Staff did not do that in regard to these waterways.
- 3.5 – Page 16. The analysis of the bison remains suffers from a similar deficiency. There is no indication that the NRC Staff made any attempt to obtain the information needed to conclude whether or not the two bison skeletons found has significance to OST or the Lakota people. I would have been a simple matter of putting that question to the OST / Lakota elders and historians. The failure of the NRC Staff to follow up on this renders the conclusions in this section as not in compliance with the Staff's NHPA obligations.

- 3.6 – Page 17, section paragraph 3. Again, the SEA writes off identified vision quest sites because the Staff did not have evidence whether or not the sites were in current use. Writing off potential TCPs because the Staff failed to follow up and obtain readily available information from Lakota elders again fails to satisfy the Staff's NHPA obligations.
- 4.0 – Page 17, section paragraph 2. The description of the NRC Staff's NEPA obligations in this section fails to track the Board's decision because it fails to mention the obligation to identify both tangible *and intangible* interests that may be impacted by the renewal of the license of CBR's activities. As discussed above, it diminishes and avoid discussion of the NRC Staff's obligations to fully consider and discuss the intangible interests of OST and the Lakota peoples.
- 4.3.2 – Page 20, section paragraph 2. Again, the SEA writes off the potential significance of certain plants found within the license area because it lacked information from OST and the Lakota experts on potential impacts to them from the activities. Again, all the NRC Staff had to do was let OST or QSI know it lacked and needed that information and it would have been provided. The failure of the NRC Staff to even notify OST of the lack of such information in these many instances where the Staff have written off potential interests of OST and the Lakota peoples, and the failure to provide OST and its people with the opportunity to provide that information to the Staff – as it did with CBR, for example – are failures of the Staff to fulfill its obligations under NHPA as set out in the Board's decision.
- 4.3.4 – see comments regarding Section 3.4 above. While noting the very great historical significance of these creeks to the Lakota and OST as well as other Native peoples and nations, the SEA again writes off these waterways as lacking information that the Staff could have easily obtained from OST and Lakota historians, elders, and spiritual advisers. This does not satisfy the NRC Staff's "hard look" obligations under NEPA.
- 4.5 – In section paragraph 1, the SEA relates the importance to OST as "the caretaker of its traditional territory" – an essential and highly important spiritual and cultural obligation – and OST's recommendation that it participate in a meaningful manner in the reclamation of the license area consistent with its culture and traditions to fulfill those cultural and spiritual obligations to the land, water, and ancestors. Reclamation of an impacted area is a key component of both the NRC license and its renewal and of NEPA. However, in discussing mitigation measures, the SEA in section paragraph 4, concludes – while acknowledging "the historic and cultural significance of the Crow Butte region to the Tribe" - that "there are no significant impacts expected" and therefore "no need to consider

potential mitigation measures to reach a FONSI.” The SEA is void of any discussion of the impacts on the recognized “importance to OST” that it participate in the reclamation of the impacted area to comply with its stated cultural and spiritual obligations. These are known “intangible” and tangible (ie, the condition of the area after CBR is done) interest of OST and the Lakota people that are ignored in the proposed draft SEA. Given all the impacts this activity has had on the ancestral treaty lands of OST and the Lakota people and how hard they have fought to protect their lands, it is a very small demand that they and their interests be included in the reclamation of the license area.

- 4.6 – Section paragraph 2. The Summary summarily writes of the NEPA considerations with one line. It’s another indication of the minimization of the important historic, cultural, political, and spiritual “intangible” interests of OST and the Lakota people.
- As a general comment, the Report prepared by QSI for OST and submitted to the NRC Staff contains significant oral history (pages 10-14) and often tragic history (pages 14-24) amply demonstrating the great cultural, historical and spiritual significance of the license area to the OST and the Lakota peoples as well as other Native peoples and nations. There is little to discussion of these oral histories or history in the draft SEA. The omission of this discussion further minimizes and avoids the great significance and importance of this area to OST and the Lakota peoples and undermines the both the NHPA and NEPA discussion of the significance of the TCPs and the potential impact on interests of OST and the Lakota peoples.
- The proposed draft SEA makes 14 references to “Native American” sites / interest. Sections 2.1, 3.1, 3.3, 3.4. It also refers to “American Indian tribes.” Footnote 7, Section 4.3.4. “Native American” is a colonial designation. Native nations and peoples have not conceded their sovereignty and right to self-determination. Just “Native” would be more appropriate. “American Indian” is both a colonial and a racist designation. Further, using “tribe” instead of “nation” diminishes the sovereignty of Native first nations and peoples. President Biden’s Executive Order acknowledges that the relationship between Native peoples is “nation-to-nation,” replacing the previous designation of “government-to-government,” to clarify the sovereign, national, character of Native nations and peoples. “Tribe” should only be used when it has been incorporated in a Native nation’s name, such as the Oglala Sioux Tribe, which is a holdover from the 1950s when the United States was forcibly attempting to assimilate Native nations and peoples and destroy their existence. The preferred use is “nation” or “peoples”.

- REFERENCES – OST has not been provided copies of all of the materials used by the NRC Staff in the preparation of the proposed draft SEA such as the communications with CBR and the NHPO and the references to Mr. Spangler’s submissions. Please provide them at your earliest convenience.

Thank you for this opportunity to review the proposed draft SEA prior to its finalization. Please let me know if there is any additional information you need for the SEA or wish to discuss and attempt to resolve any of the issues or concerns expressed above.

Sincerely,


Andrew B. Reid
OST Counsel

cc: OST President
Harold Salway, OST Natural Resources Department
Thomas Brings, OST THPO