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Cc:	Jean Trefethen; Marcia Simon; Kevin Killer; Harold Salway; tbrings@oglala.org; Lorraine Baer
Subject:	[External_Sender] OST Comments re Crow Butte Draft Supplemental Environmental Assessment
Attachments:	22.09.23 - OST Crow Butte DSEA Comments.pdf

Please find attached the comments of the Oglala Sioux Tribe regarding the Crow Butte License Renewal (SUA 1534 / Dkt No. 040-8943) Draft Supplemental Environmental Assessment.

Thank you,

Andrew B. Reid, JD, LLM
OST Counsel, Crow Butte litigation

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Comment Number: 3

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September 26, 2022

VIA E-FILING / EMAIL: CrowButte-LicRenSEA@nrc.gov

John M. Moses, Deputy Director
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Re: Comments of the Oglala Sioux Tribe to the Draft Supplemental Environmental Assessment and the NRC Staff's Preliminary Conclusions Regarding the License Renewal of the Crow Butte Resources, Inc. *In Situ* Uranium Recovery Facility in Crawford (Dawes County), Nebraska (Docket Number: 040-8943)

Dear Deputy Director Moses:

Pursuant to 36 CFR 800.8(c)(2), the Oglala Sioux Tribe (OST) submits the following comments to the US Nuclear Regulatory Commission's (NRC) Draft Supplement Environmental Assessment (DSEA) (ADAMS ML 14288A517) and Preliminary Conclusions on Contention 1 dated August 2022 on the Renewal of US NRC License Number SUA-1534 for the Crow Butte Resources, Inc. (CBR) *In-Situ* Uranium Recovery Facility in Dawes County, Nebraska (Docket Number 040-8943 / Docket ID NRC-2022-0153).

I. The DSEA Fails to Establish Proper US Authority and Jurisdiction, or the Consent of OST, to the Licensed Activity

It is the burden of the United States under NEPA to discussion and demonstrate compliance with all applicable law and to establish its and its agency's, the NRC, lawful authority and jurisdiction over the territory and licensed activities at issue. Subject matter jurisdiction may be raised and challenged at any time in a proceeding. The United States and the NRC lack jurisdiction over the territory of the Oceti Sakowin Oyate (of which the Oglala Lakota (OST) are a part) or over the natural resources and affairs of the Oyate and therefore lack authority to license CBR's activities within that territory without the consent of OST and the Oyate.

The Crow Butte commercial uranium milling facility is located on lands belonging to the sovereign Oglala Sioux Tribe and its people as part of its "unceded" territory secured by treaty, and not within the territory or on lands of the United States or any of its subdivisions by which the NRC may exercise any lawful jurisdiction. The natural resources that Crow Butte seeks a license from the NRC to continue to exploit, degrade, and destroy for private profit also belong to the Oglala Sioux Tribe and its people. The Tribe is the lawful possessor of sovereign jurisdiction, to the exclusion of the United States, over the territory upon which both the land and its natural resources lie and is the rightful caretaker of that land and its natural resources, including its minerals and its surface and ground water and air. The United States is the *de facto* wrongful occupier of that Tribal territory and lacks lawful, *de jure*, jurisdiction over the activities that occur within that territory or over the land and its natural resources.

By Article V of the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749, with the Sioux Nation (which included the Oglala Sioux), the United States recognized and acknowledged the territory of the Tribe, including the territory containing the lands and minerals at issue here. Then, by Article XVI of the Fort Laramie Treaty of 1868, 15 Stat. 635, with the United States, the Tribe again secured against the United States its territory and lands, including the "unceded" territory containing the lands and minerals being subjected to the activities of the Crow Butte uranium milling facility under a license issued by the NRC for the United States. By the Treaty of 1868, Articles II and XVI, the United States "solemnly" agreed that "no persons" would be authorized without the prior consent of the Tribe "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article …." Neither treaty provided for any right of abrogation in any party to the treaty. Rather, Article XII of the Treaty of 1868 expressly provided and agreed that no further cession of any Sioux territory or lands could be made by the Sioux Nation "unless [by treaty] executed by at least three fourths of all the adult male Indians, occupying or interested in same."

Following the discovery of gold in the sacred Paha Sapa, the Black Hills, in 1874 by a large US military expedition led by General George Custer which entered Sioux territory under false pretext, the US government abandoned its treaty obligation to preserve the integrity of the Sioux territory from trespassing prospectors and settlers. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 376-79 (1980). In 1876, the US government declared that the Sioux found lawfully within the "unceded" Sioux territory in Nebraska to be "hostiles" and engaged in a war campaign against them. *Id*., 448 U.S. at 379. The next year after unsuccessful attempts to negotiate the cession of the Black Hills by the Sioux, the United States attempted a wrongful taking through the ratification of a fraudulent treaty that opened up the Black Hills and the Sioux territory and lands in Nebraska, including the Article XVI territory and lands, for settlement. Act of February 28, 1877, 19 Stat. 254; *Sioux Nation*, 448 U.S. at 381-84, 424.

After over a century of challenges by the Sioux Nation to this unlawful attempted abrogation of the Treaty of 1868, the United States Supreme Court in 1980 per Justice Blackmun finally considered the challenge and agreed the 1877 treaty was fraudulent, but held that the Congressional ratification of the fraudulent treaty was an "effective" – not express – abrogation of the 1868 Treaty. *Sioux Nation*, 448 U.S. at 382-83. The Court then ruled that the Act of 1877 was a "taking" by the United States under its "plenary" power over Indian nations and awarded the Sioux Nation purported "just compensation" for the theft of its ancestral, treaty protected, territory, lands and natural resources. *Id*., 448 U.S. at 410-12, 423-24 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) on the exercise of plenary power). However, the Sioux Nation, and particularly the Oglala Sioux, having not given up its claim to its treaty lands, rejected and refused to accept the award and demanded, and continues to demand, the relinquishment of their territory and lands from occupation by the United States. *See, e.g., Hearing Before the Select Committee on Indian Affairs, United States Senate*, 99TH Cong., 2d Sess., S. 1453 (Sioux Nation Black Hills Act) http://www.gpo.gov/fdsys/pkg/CHRG-99shrg63488/pdf/CHRG-99shrg63488.pdf; *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. U.S. Army Corps. of Eng'rs*, 570 F.3d 327 (D.C. Cir. 2009); Lazarus, Edward. Black Hills/White Justice: The Sioux Nation versus the United States, 1775 to the Present (1991).

Parsing the language of Justice Blackmun in *Sioux Nation*, the Act of 1877 was not a proper abrogation of the 1868 Treaty but, rather, was an exercise of the assumed plenary power of Congress over Indian nations and peoples that "effectively" abrogated the Treaty, in essence an "implied" abrogation. *See, e.g., Horner v. United States*, 143 U.S. 570 (1892); *Whitney v. Robertson*, 124 U.S. 190 (1888); G. Hackworth, Digest of International Law, 185-98 (1943). The law on abrogation of Indian treaty rights requires a "clear showing of legislative intent" "not lightly implied." *United States v. Santa Fe Pac. RR Co.*, 314 U.S. 339, 353 (1941); *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Generally, this requires an express statement of

Congress in order to abrogate treaty rights. *Leavenworth, Lawrence, & Galveston RR Co. v. United States*, 92 U.S. 733, 741-42 (1876); *Frost v. Wenie*, 157 U.S. 46, 60 (1895); *also, Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973); C.F. Wilkinson & J.M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows upon the Earth – How Long a Time is That*, 63 Cal.L.Rev. 601 (May 1975).

Treaties are governed by principles of international law and grounded on the fundamental principle of *pacta sunt servanda*, that treaties must be obeyed. *See*, Vienna Convention on the Law of Treaties ("Vienna Convention"), art. 26 (May 23, 1969), 1155 U.N.T.S. 331, 339 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."). This principle has been recently restated by the United State as a signatory[1] in regards to treaties with indigenous nations in the United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP"), art. 37, sec. 1 (September 13, 2007) ("Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements, and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements."). Even when provisions of a treaty allow a party to unilaterally withdraw from the agreement, the withdrawing state is not released from obligations that occurred, nor excused from violations that existed prior to the date that its withdrawal took effect. *See*, Vienna Convention, art. 70(1), 1155 U.N.T.S. at 349.

Unilateral withdrawal as here from treaties that do not contain exit provisions may be a breach of the treaty, particularly where treaty provisions expressly foreclose unilateral withdrawal by the parties – "absolute and undisturbed use and occupation," "no persons …shall *ever* be permitted to pass over, settle upon, or reside in the territory described in this article" (1868 Treaty, art. II) (emphasis supplied). Vienna Convention, art. 56 (an agreement "which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal …."); *see also, e.g.*, U.N. Human Rights Commission, 53rd Sess., General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 26(61), at 102 ¶s 1-5, U.N. Doc. A/53/40 (1998).[2] "[T]reaties with the Indians must be interpreted as they would have understood them." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Clearly, the Sioux Nation did not understand the provisions of the 1868 Treaty as granting the United States any right to unilaterally abrogate the Treaty. Furthermore, abrogation of the 1868 Treaty whether express or implied would merely

[1] 78 Fed.Reg. 26384 (May 6, 2013).

[2] Abrogation of a treaty by a state under the doctrine of changed circumstances, *rebus sic stantibus*, requires a fundamental change in circumstances that occurred since the making of the treaty and which could not have been foresee at the time. Vienna Convention, art. 62. Further, the doctrine requires that the abrogating party have approached the other party in a good faith effort to settle the problem. Vienna Convention, arts. 65, 66. *See also, International Law Commission Report* (1966), 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

place the parties, the Sioux Nation and the United States, in the position they were in prior to the treaty under the Fort Laramie Treaty of 1851[3]. For those reasons, the abrogation of the 1868 Treaty would not result in any taking of any territory or lands of the Sioux Nation.

Therefore, as held by Judge Blackmun, any taking of the territory and lands at issue would have had to occur pursuant to the "plenary" power unilaterally assumed under in the subsequent *Lone Wolf* decision by the colonial occupier, the United States, over the territory, lands, and affairs of the sovereign Sioux Nation and its people. *Sioux Nation*, 448 U.S. at 410-12, 423-24. There lies the problem. Neither the sovereign Sioux Nation nor the sovereign Oglala Sioux Tribe nor the Oglala peoples, the Lakota, have ever accepted or acceded to the plenary power of the United States over them as a matter of law, and do not now. They recognize the *de facto* exercise of plenary power over them by the United States as an occupying colonial state, but that does not and has never made that brute exercise of colonial power lawful or provided any basis for the lawful taking of any territory or jurisdiction or lands or natural resources of the Sioux Nation, the Oglala Sioux Tribe, or the Lakota peoples.

The claim by the United States of lawfulness in the exercise of plenary power over the Sioux is a legal colonial fiction constructed to "legalize" an illegal taking of Sioux territory and lands - no less a fiction than the "natural law" of Nazi Germany, Lebensraum, modeled after the prior exercise of plenary power by United States over indigenous nations and peoples, that purportedly justified and legalized the German invasion and the occupying and taking of the territories and lands of Poland and other "less civilized" nations of eastern Europe and the Nuremburg Laws that "legalized" the removal and killing, the genocide, of lesser peoples. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz.St.L.J. 113, 184-86 (2002) ("Clinton"); Shelley Baranowski, Nazi Empire: German Colonization & Imperialism from Bismarck to Hitler (2011), 141.

Any and all power of the United States in its relations with other sovereign nations is constrained by international law, the "law of nations," and any and all power of the United States government arises from and is subject to the United States Constitution. *See*, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The United States Constitution fails to provide any support for the colonialist exercise of plenary power by the United States over sovereign indigenous nations, including the taking of indigenous territory, lands, and resources and the removal of indigenous peoples from their ancestral, treaty secured, territory and lands. Clinton, 169-205; Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 Am. Ind. L. Rev. 57 (1991); *also,* Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from*

[3] The abrogation of the 1868 Treaty would withdraw the provision under Article XVII abrogating and annulling all prior treaties and agreements.

Their Homeland, 39 William & Mitchell L. Rev. 538, 564-78 (2013); Note, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 Yale L.J. 793, 806-08 (Feb. 1989). "All manifestations and forms of colonialism" – of which the exercise of an assumed plenary power by the United States is one - have been universally condemned by the nations of the world for over 80 years. *See*, UN Charter, chaps. XI, XII, XIII (1945); UN General Assembly Resolution 1514 (1960); International Convention on the Elimination of All Forms of Racial Discrimination (1965) (signed and ratified by the United States) (Preamble adopting UN Res. 1514 and recognizing colonialism as a condemned form of racism).

Most recently, the international community with near unanimity has acknowledge in Article 19 of the UN DRIP, executed by the United States, that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 10 provides: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and …where possible, with the option of return." The requirement of "free, prior and informed consent" of the affected indigenous peoples before the State's adoption or implementation of legislative or administrative measures is an express rejection of the exercise of plenary power by a state over indigenous peoples. See also, ILO Convention 169, art. 6, sec. 2 and art. 26, sec. 2 (1989).

Furthermore, Article 26, Section 1 of the UN DRIP executed by the United States provides that: "Indigenous peoples have a right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." Article 26, Section 2 provides: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." Article 26, Section 3 further provides: "States *shall* give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned." (emphasis added)

In another matter very similar to the one at bar, two members of the Western Shoshone tribe, sisters Mary and Carrie Dann, challenged the authority of the federal government over ancestral tribal lands, secured by treaty, which were being considered for gold mining. The Danns and other Western Shoshone contended that the United States had unlawfully abrogated the treaty and taken the tribal lands which had been trespassed and encroached upon by settlers for which an award of compensation had been issued by the federal government. *United States v. Dann*, 470 U.S. 39 (1985); *Western Shoshone National Council v. Molini*, 951 F.2d 200 (9th Cir. 1991). Like the Sioux, the Western Shoshone rejected the award, challenged the

exercise of plenary power by the United States in taking the lands, and demanded the return of the tribal lands. *Id*. The courts held that federal Indian law did not provide a remedy for the return of lands that had been wrongfully taken from the Western Shoshone and that the unaccepted award of compensation had mooted the demand for the return of the land. *Id*.

The Dann sisters then submitted a petition with the Inter-American Commission on Human Rights (IACHR), the human rights tribunal of the regional international body of the Americas, the Organization of American States, of which the United States is a member, requesting a determination of whether federal Indian law deprived them and the Western Shoshone of various human rights, including the indigenous peoples collective right to property, the right to equality under the law, and the right to an effective remedy. The right to equality was violated in that indigenous peoples were the only peoples or race being collectively denied the right to property and a remedy to protect that right. In late 2002, the IACHR issued its landmark ruling concluding that United States failed under international law to ensure the Dann's collective human right to property and equality under the law[4] by denying them a remedy that included the return of the land wrongfully taken from the Western Shoshone peoples. *Dann v. United States*, Case 11.140, Report No. 75/02, Doc. 5. 1 at 860 (2002), ¶s 171 and 172. The IACHR then recommended that the United States revised its domestic laws, federal Indian law, to provide an effective remedy that includes the return of wrongfully taken indigenous property. *Id*., at ¶173, Recommendations 1 and 2.

Following the IACHR *Dann* decision, the Western Shoshone National Council submitted a petition to the United Nations Committee on the Elimination of Racial Discrimination ("Committee") requesting the issuance of a warning of human rights violations by the United States and urgent action recommendations to correct those violations. The Committee is the international body tasked with obtaining state compliance with the International Convention on the Elimination of All Forms of Racial Discrimination (December 21, 1965), United Nations, Treaty Series, vol. 660, p. 195 ("ICERD"), which the United States has signed and ratified. The Committee granted the petition, found that there was "credible information alleging that the Western Shoshone indigenous peoples are being denied their traditional rights to land," expressed its concern by the lack of action by the United States, expressed its concern regarding the position of the United States "that Western Shoshone peoples' legal rights to ancestral lands have been extinguished through gradual encroachment," and noted that the position asserted by the United States was "made on the basis of processes [under federal Indian law], which did not comply with contemporary international human rights norms, principles, and standards that

[4] In *Mabo v. Queensland (No. 1)*, 166 LCR 186, HCA 69 (1988), for example, the High Court of Australia applied the International Convention on the Elimination of All Forms of Racial Discrimination in voiding a domestic law that would have denied the Torres Strait indigenous peoples a collective right to property equal to that of non-indigenous Australians.

govern determination of indigenous property interests [citing the IACHR *Dann* decision]." *Id*. at ¶s 4, 5, and 6. The Committee then opined that the United States had violated its obligation under the ICERD to guarantee the Western Shoshone peoples collective equality before the law without discrimination based on race, colour, or national or ethnic origin. *Id*. at ¶s 7 and 8. The Committee drew the attention of the United States to the Committee's General Recommendation 23 (1997) on the rights of indigenous peoples, in particular their right to own, develop, control and use their communal lands, territories and resources (*Id*. at ¶ 9) and urged the United States to: "a) Freeze any plan to privatize Western Shoshone ancestral lands for transfer to multinational extractive industries and energy developers;" and "b) Desist from all activities planned and / or conducted on the ancestral lands of Western Shoshone or in relation to their natural resources, which are being carried out without consultation and despite protests of the Western Shoshone peoples…." (*Id.* at ¶ 10). The very same rule applies here to the protection of the collective human right of the Oglala Sioux Tribe and its people in the ancestral treaty-secured lands upon which the Crow Butte activities are taking place and are sought to continue under license from the United States.

As matters of both domestic and international law, there was no lawful exercise of plenary power by the United States over the Sioux Nation and its peoples through the Act of 1877, and there was no lawful taking of the territory or lands or natural resources of the Sioux Nation or the Oglala Sioux Tribe, including the territory, lands, and natural resources at issue here. The DSEA fails to even discuss let alone demonstrate lawful jurisdiction and authority in the NRC to issue any license to Crow Butte for any activities upon this territory and land without the prior consent of the Oglala Sioux Tribe and the Oceti Sakowin Oyate. The DSEA therefore is in violation of NEPA and substantively deficient.

II. The NRC Staff Lacks Appropriate and Sufficient Knowledge and Expertise to Assess and Make Conclusions on Contention 1

As a general comment, without waiving OST's objections to jurisdiction and licensing authority, it is our (OST's) understanding that the DSEA was prepared primarily by contract with Mr. Jerry Spangler, an archeologist with Unita Research LLC (ML19011A460) and that the NRC Staff did not employ any person with sufficient or appropriate knowledge of Lakota history, culture, traditions, or spirituality in the preparation of the DSEA. 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.

In attempting to implement the PID, the NRC Staff in consultation with OST developed its Survey Methodology (ML 21252A089)[5] whereby Quality Services, Inc. (QSI) conducted the supplemental NHPA / NEPA survey of the Crow Butte License Area under contract and in consultation with OST and employing members of the Lakota peoples fluent in the Lakota language, history, culture and traditions. QSI then prepared the Report (ML 22160A272 (redacted)) (QSI Report) on its survey which was submitted by OST to the NRC Staff for its use in preparing the DSEA.

Thus, the Contention 1 DSEA 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 DSEA 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 DSEA 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.

[5] *See*, 36 C.F.R. §§ 800.4(b)(2), 800.14(b).

III. The DSEA Is Deficient in Failing to Consider the Historic, Sovereign, Cultural, and Spiritual Interests of OST in the Recognition and Obedience to Its Treaties and Laws

Without waiving OST's objections to jurisdiction and licensing authority, NEPA requires the NRC to take a "hard look" at "*every significant aspect of the environmental impact*" of the Crow Butte licensing action.[6] The DSEA ignores and wholly fails to take any look, let alone the hard look required by NEPA, at the interests of the Lakota peoples and OST elaborated by OST on pages 2 and 3 of the QSI 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 (wóopȟe), the 1851 and 1868 Ft. Laramie Treaties, and binding international law, the United States has exercised and continues to exercise the unlawful colonial rule 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 – specifically raised again in the QST Report and OST's subsequent communications with the NRC Staff, were addressed in the DSEA. The DESA therefore remains in non-compliance with NEPA as well as Lakota law, United States law (the 1851 and 1868 Treaties), and international law. The licensing actions of the NRC as an exercise of the assumed "plenary" (total) authority of an unlawful colonial ruler, the United

[6] *Indian River Cnty, v. U.S. Dep't of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87 (1983).

States, over the territory, lands, resources, and peoples of the Oceti Sakowin Oyate and OST. It is a racist colonial affront to and violation of sovereignty, integrity, and the fundamental rights to self-determination and equality of peoples and nations secured under the law of nations, international law. It demeans OST and the Oyate as peoples and nations, demeans their customary laws, demeans their Treaties, demeans their culture and traditions, demeans their welfare as persons and peoples, and demeans their spiritual obligations to the impacted lands, their natural relatives, and Unci Maka (Grandmother Earth). These are significant and legitimate interests of OST and the Oyate that have been consistently raised in response to the agency's actions and CBR's activities but have been and are once again ignored and dismissed by the agency – yet another slight to OST, the Oyate, and the Lakota people. This substantive slight and failure by the agency renders the DSEA fundamentally deficient under NEPA. *See*, 36 C.F.R. §800.8(a)(1).

IV. The DSEA Fails to Adequately Consider OST's "Intangible Interests" and Non-National-Register-Eligible Tangible Interests Under NEPA

Without waiving OST's objections to jurisdiction and licensing authority, Section 1.1 of the DSEA (page 1, last paragraph) misstates the Board's decision when read with DSEA'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 10, last paragraph in section, limiting the survey to "tangible" artifacts), and 3.2 (page 13, 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 every significant aspect, 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 by the DSEA 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 DSEA 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. This error permeates the DSEA and skews its discussions and conclusions away from a proper and adequate consideration of OST's potentially impacted intangible and non-National-Register-Eligibility tangible interests, again, rendering the DSEA substantively deficient and in not in compliance with or satisfaction of NEPA requirements.

As noted above, NEPA requires the NRC to take a "hard look" at "*every significant aspect of the environmental impact*" of the Crow Butte licensing action – including, as the Board correctly ruled, on the impacts of the "intangible" and non-National Register-Eligibility aspects of the environment of OST and the Lakota people. The DSEA's persistent avoidance of consideration of the impacts upon particularly the intangible aspects of the environment, including OST's and the Oyate's sovereignty, and their historic, cultural, and spiritual interests, is fatal to the agency's compliance with NEPA and the adequacy of the assessment as the avoidance compromised immensely important interests of OST and the Oyate which are part of the environment within the scope of NEPA. For that reason, the DSEA's description of its NEPA obligations at Section 4.0, paragraph 2, is misleading, incomplete, inadequate, and not a proper statement of the law.

This is further troubling in that the agency at Section 2.2, paragraph three, acknowledges the ruling of the Board that "the Tribe has the unique expertise to identify sites that are significant to it and to ascribe significance to such sites" and that, for that reason, the agency agreed to a survey methodology whereby the Tribe would conduct the survey on its own or through an appropriately qualified contractor, here QSI. Yet, when the QSI Survey Report was submitted to the agency, the agency wholly ignored in its DSEA the Report's express and highlighted identification of impacted historic, cultural, spiritual, sovereignty, and Treaty interests of OST and the Oyate discussed above – and in the Report. By picking-and-choosing which interests it would consider impacted or significant to OST and the Oyate, the agency fatally undermined the purpose and process of having OST identify its own interests in the area impacted by CBR's license and activities and having OST ascribe the significance of those interests and impacts. Coupled with the admitted lack in the agency and its expert, Mr. Spangler, of the necessary qualifications to conduct a proper and adequate survey of OST's impacted interests, this arbitrary screening out of consideration of important environmental interests destroyed the credibility not only of the DSEA but also of the agency conclusions resting upon it. It is as if the agency reached its conclusions – finding no significant environmental impact and approving the licensed activity – and then tailored a selectively biased DSEA to

support them. This, of course, is not in compliance with, nor proper or permitted by, NEPA.

V. The Agency Failed Its NEPA Obligation to Make a Good-Faith Effort to Acquire Information It Stated in the DSEA Was Necessary for Its Discussion and Conclusions

Without waiving OST's objections to jurisdiction and licensing authority:

At Section 3.4, page 14, section paragraphs 3 and 4 and Section 4.3.4, the DSEA 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 DSEA on the nature of any potential impact from CBR activities on specific sites. *See*, DSEA, Section 5.0, last paragraph, page 22 (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.

Again, at Section 3.5, pages 14-16, 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. It 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.

At Section 3.6, pages 15-16, section paragraph 3, the DSEA writes off identified vision quest sites because the Staff did not have evidence whether or not the sites were in current use (or would be placed in use if OST members were permitted access to exercise their spiritual rights to their ancestral territory). 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.

At Section 4.3.2, pages 17-18, section paragraph 2, the DSEA again 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. As before, 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.

The Board clearly stated in its Decision that compliance with the NHPA requires a "genuine, reasonable effort" to identify TCPs. NEPA regulations on environmental impact statements, analogous here, address this situation where an agency contends when drafting its assessment that it lacks information to draw its conclusions. 40 C.F.R. §1502.21. Section 1502.21(b) states that if the "incomplete but available information relevant to foreseeably significant adverse impacts is essential to a reasoned choice among alternatives, and the overall costs of obtaining it are not unreasonable, *the agency shall include the information in the environmental impact statement*." Section 1502.21(a) requires the agency in such situations to "make clear that such information is lacking."

In DSEA Sections 3.4, 3.5, 3.6, 4.3.2, and 4.3.4, discussed above, the DSEA made clear that it lacked such information which it stated was essential to draw its impact conclusions, but failed to describe any effort at all by the agency to obtain the needed information to supplement that provided in the Report. On a review of a preliminary DSEA, OST offered to cooperate with the NRC Staff in obtaining the specific information the Staff said it lacked to draw its conclusions, but the NRC Staff never availed itself of that offer. OST and QSI cannot be expect to be clairvoyant as to what additional information the NRC Staff and Mr. Spangler might believe they need in the future to prepare the DSEA. The additional information was clearly available upon the asking and the overall costs of obtaining that information – emails or phone communications to OST or QSI, or personal interviews of Lakota spiritual advisers, were not unreasonable. The NRC Staff made that effort with CBR to obtain additional information it needed to complete the DSEA assessment and conclusions regarding the operation of the facility. It did not expect CBR to be clairvoyant as to the needed additional information, nor did it dismiss the FNSI or approval of the license for lack of information from CBR, but merely made a supplemental request for that available information. In contrast, the NRC Staff completely failed to similarly follow-up with QSI or OST (even after OST offered) to obtain available additional information the Staff believed it need to draw proper conclusions on the scope and impacts of the activities of the interests described in those DSEA Sections. Instead, the NRC Staff merely wrote off those potential environmental impacts by settling on admittedly unexplored and insufficiently supported conclusions

Under these circumstances, the NRC Staff's efforts to obtain needed available information to draw fully supported and proper conclusions on these OST interests can hardly be described as "reasonable" or "genuine." The NRC Staff was well aware of the great importance to OST of the interests described in these sections. DSEA Section 4.5 acknowledges the Report's descriptions of "the Tribe's role as caretaker of its traditional territory" and its need of "mitigative measures …to ensure the regeneration of, and access to traditional cultural properties, spiritual sites, and historical knowledge in the future." However, the NRC Staff's repetitious, almost cavalier, demeaning use of the "lack of [reasonably available] information excuse for not completing a proper NEPA assessment of these very important OST interests is evidence of the NRC Staff's implicit bias, lack of understanding, and lack of appreciation and seriousness of its duties in preparing the DSEA. The agency's open avoidance of its duties wholly undermines the credibility of the conclusions reached in Sections 3.4, 3.5, 3.6, 4.3.2, and 4.3.4 of the DSEA and renders it arbitrary, capricious, unreasonable, substantively deficient, and in violation of NEPA.

VI. The DSEA's Dismissal of OST's Participation in Mitigation of Adverse Impacts Was Arbitrary, Unreasonable, and Unlawful

Without waiving OST's objections to jurisdiction and licensing authority, the DSEA in Section 4.5 notes and then dismisses, as not within the scope of its duties to the Board under the PID, OST's requested participation in measures consistent with and in fulfillment of its role as caretaker of its traditional territory to mitigate the impacts of the licensed activities, particularly in the reclamation of the land and water. *See also*, Letter of July 29, 2022, Thomas Brings, OST Cultural Affairs and Historic Preservation Office, to the U.S. Nuclear Regulatory Commission Office of Nuclear Materials and Safeguards Division of Rulemaking, Environment and Financial Support opposing the renewal of the CBR license and requesting involvement in the Reclamation Process. The agency does not deny that it has authority over the mitigation measures required in CBR's license from the agency. OST is, frankly, outraged by the agency's response. In the same breath that the agency acknowledges OST's spiritual obligations to the land, water, and ancestors in healing the injuries caused by the activities licensed by the agency, it disconnects such mitigative measures from the very impacts it is required to consider under NEPA.

"Supplementing" the EA as to Contention 1 obviously implies fulfillment of NEPA's requirement to include mitigative measures in the discussion and conclusions to minimize and repair the impacts. 32 C.F.R. §651.15 (for example); 40 C.F.R. §1508.1(s).[7] "Mitigation" is directly tied to and is a key component of impact

[7] *Also*, "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," CEQ Memorandum (January 14, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf; "Final Guidance for Federal

assessment. *Id*. 32 C.F.R. Section 651.15(a) requires: "Throughout the environmental analysis process, the proponent will consider mitigation measures to avoid or minimize environmental harm." Section 651.15(b) states: "When the analysis proceeds to an EA or EIS, mitigation measures will be clearly assessed and those selected for implementation will be identified in the FNSI or ROD. Reclamation of an impacted area is a key component of both the NRC license and its renewal and of NEPA. The agency's NEPA / EA findings, including a finding of no significant impact like that made in the DSEA, cannot be made without full consideration of mitigation measures. *Id*.; also, footnote 7 below.

The agency does not deny that there are environmental impacts to the environment from CBR's licensed activities on the ancestral and Treaty lands of the Oceti Sakowin Oyate and OST. There is obviously 40+ years of *in situ* mining of the groundwater of a large part of the aquifer through toxic injection solutions and production of highly radioactive source material in solution. There is very widespread surface disturbance from the exploration, injection, production, and monitoring wells, roads, and processing facility which is described in the license application, EA, and DSEA. The Lakota people of the Oceti Sakowin Oyate and OST do have expressed intangible and environmental interests, specific to them, in how their ancestral and Treaty lands are repaired. These are environmental interests of the Oyate and OST, "*significant aspects of the environmental impact*", that contrary to the NRC Staff's dismissal, are within the scope of NEPA and the Board's PID.

The DSEA contains NO discussion of any mitigation measures. 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 designing and implementation of mitigation measures and the reclamation of the license area. The Lakota people look forward to regaining possession of their ancestral Treaty territory and occupying and using it as they traditionally have. This territory and the land, water, and other natural resources are sacred to them. This ignoring of the impacts on OST's interests in its ancestral territory and dismissal of its spiritual, cultural, and sovereign interests in caring for land and its resources is unreasonable, arbitrary, and in violation of NEPA.

VII. The DSEA Finding of No Significant Impact Is Not Supported

For the reasons stated above, the DSEA is not in compliance with law, is substantively deficient, incomplete, improperly biased, lacking in credibility, and lacking in sufficient factual or legal support for a finding of no significant impact upon

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Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," 76 F.R. 3843 (January 21, 2011), https://www.federalregister.gov/documents/2011/01/21/2011-1188/final-guidance-for-federal-departments-and-agencies-on-the-appropriate-use-of-mitigation-and.

the interests of OST as part of the environment of the CBR license area. Further, the agency lacks subject matter jurisdiction over the Treaty-recognized sovereign territory of OST and lacks lawful authority to license CBR's activities within that territory without the free, prior, and informed consent of OST and the Oceti Sakowin Oyate, which has not been and is not given. The DSEA improperly and unlawfully demeans, diminishes, and dismisses the interests of OST and fails to comply with NEPA. The agency action contained in the DSEA is arbitrary, capricious, unreasonable, and not incompliance with law, including but not limited to the Fort Laramie Treaties between the Oceti Sakowin Oyate (including OST) and the United States, NEPA, the Administrative Procedures Act[8], the laws of nations (international law) cited above, and the customary law of the Lakota peoples (wóopȟe).

Sincerely,

Andrew Reid

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