

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the)	
In Situ Leach Facility, Crawford, Nebraska))	May 1, 2015

**THE OGLALA SIOUX TRIBE’S RESPONSE TO NRC STAFF’S
MOTION IN LIMINE TO EXCLUDE CERTAIN EXHIBITS
FILED BY CONSOLIDATE INTERVENORS AND THE OGLALA SIOUX TRIBE**

The Oglala Sioux Tribe (“OST” or “Tribe”) submits the following response to the NRC Staff’s Motion in Limine to Exclude Certain Exhibits Filed by Consolidated Intervenors and the Oglala Sioux Tribe (“NRC Staff Motion in Limine”).

I. INTRODUCTION

On May 8, 2015, the Tribe and Consolidated Intervenors (“CI”) submitted 68 joint exhibits, exhibits INT-001 through INT-068, and the Tribe submitted an additional exhibit, OST-001. Two rebuttal exhibits were subsequently submitted by CI, exhibit INT-069 and INT-070. By its motion the NRC Staff seeks to exclude certain of those exhibits. The Tribe hereby responds to the NRC Staff Motion in Limine in regards to the EA Contention 1 cultural resource survey exhibits INT-23, INT-024, INT-025, INT-27, INT-28, INT-29, INT-30, and in regards to EA Contention D and Contention 9 exhibit OST-001. Consolidated Intervenors will respond to the NRC Staff Motion in Limine as it pertains to exhibits INT-001, INT-002, INT-004, INT-005, INT-010, INT-012, INT-046, INT-047, INT-048, INT-049, INT-051, INT-069, and INT-070.

The Tribe hereby expressly joins and adopts as set forth herein the response of Consolidated Intervenor to the NRC Staff Motion in Limine.

II. DISCUSSION

A. Legal Standards Governing Motions in Limine

This is an administrative, not a judicial proceeding, and although the Federal Rules of Evidence will generally be followed, the discretion of the hearing officer in regards to the admission of evidence is broader and more relaxed. For example, there is a “long-established rule that hearsay is generally admissible in NRC adjudicatory proceedings.”¹ Further, if there is any question at all on the admissibility of evidence, rulings on motions in limine should be deferred until the evidentiary hearing as the context, evidence, and arguments are developed.²

B. Contention 1 Exhibits INT-023, INT-024, INT-025 and INT-030

CI and the Tribe have jointly submitted Exhibits INT-023, INT-024, INT-025 and INT-030 in regards to the Contention 1 issue of “[w]hether the cultural surveys performed and incorporated into the EA formed a sufficient basis on which to renew Crow Butte’s permit.”³ The NRC Staff contends that the sworn witness statements, INT-023 (Joe American Horse), INT-024 (Oliver Red Cloud), and INT-025 (Floyd Looks for Buffalo Hand), and the

¹ *Alabama Power Company* (Joseph M. Farley Nuclear Plant, Units 1 and 2), 1992 WL 111147, *2 (NRC 1992) (citing, *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-863, 25 NRC 273, 279 (1987) (citing cases)).

² *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F.Supp. 1257, 1262 (N.D. Ohio 1980); *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), 2002 WL 818124 (NRC 2002).

³ *Crow Butte Resources, Inc.* (License Renewal for the In-Situ Leach Facility, Crawford, Nebraska), LBP-15-11, 81 NRC ____ (slip op. at 61) (March 16, 2015) (LBP-15-11).

Memorandum of Law, INT-030, should be excluded because they are from the review of Crow Butte Resources (“CBR”) license application for its sister site, the North Trend, that the witnesses are not witnesses in this proceeding, and that they “generally” discuss treaty issues, which the NRC Staff asserts is not a matter within the scope of Contention 1.⁴

First, contrary to the NRC Staff’s representation, witness Joe American Horse is a party to this proceeding as a named member of Consolidated Intervenors, and is listed as a witness in this matter.⁵ Second, these witnesses and the Memorandum were submitted in regards to the CBR licensing proceeding at the neighboring North Trend site and address the general background and history of the use of the area by Oglala Sioux, certainly a matter relevant to the adequacy of analysis and the procedures used by the NRC Staff in assessing the impact of the CBR activities on the cultural resources of the area. Oglala Chief Joe American Horse, for example, discusses the importance of the Red Cloud Agency (Fort Robinson) immediately to the north of the CBR Renewal area to the Oglala people.⁶ Oglala Chief Red Cloud also discusses the Oglala Lakota ties to the land containing the CBR Renewal site and to historic and legal interests in the water in the area.⁷ Similarly, witness Floyd Looks for Buffalo Hand discusses the historic

⁴ NRC Staff Motion in Limine, pp. 7-8.

⁵ *Crow Butte Resources, Inc.* (License Renewal for the In-Situ Leach Facility, Crawford, Nebraska), ASLBP No. 08-867-02-OLA-BD01 (Consolidated Intervenors’ Witness list at p. 2) (March 30, 2015).

⁶ Exhibit INT-023, p. 4. He also discusses the importance to the Oglala people of clean water on the Oglala Sioux Reservation – “downwind” from the CBR Renewal site, an issue relevant to Contention D. INT-023, p. 180.

⁷ Exhibit INT-024, pp. 1-3. The Oglala claim of a historic interest in the water rights is also an issue relevant to Contention D. INT-023, p. 180.

ties of the Oglala Lakota to the minerals of the area.⁸ As the Board ruled in *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation),⁹ “that the witness’ mention matters [outside the scope of the contention] is intended only to provide context or background for the [contended] matters...”¹⁰

On the issue of reliability, the witness statements contained in exhibits INT-23, INT-24, and INT-25, were given under oath, at a formal evidentiary proceeding at which the witnesses were subject, if the Board or the parties so desired, to questioning and cross-examination. Both the NRC Staff and CBR were parties to the proceeding, as was the Tribe. There was no challenge then, nor in the NRC Staff’s Motion in Limine, to the qualifications of any of these three witnesses. All three are clearly highly esteemed spiritual leaders of the Oglala Lakota peoples with knowledge of the Tribe’s culture and history. They each provided “fact” testimony, not expert opinion, of which the restrictions on hearsay are relaxed, particularly in light of the traditional use of “oral” history by indigenous peoples.¹¹

The Memorandum, exhibit INT-30, is a general argument of law that applies equally to the issue of the adequacy of the cultural resources consultation at the North Trend and the Renewal sites. The Memorandum states that it is directed to the “applicable standards of

⁸ Exhibit INT-025, p. 2.

⁹ 2002 WL 818124, *1 (The Tribe acknowledges that decision of Licensing Boards are not binding law. Rather, the decision is cited for guidance, as an example of how this issue has been treated in other matters).

¹⁰ *Id.*

¹¹ *Alabama Power Company* (Joseph M. Farley Nuclear Plant, Units 1 and 2), 1992 WL 111147, *2 (NRC 1992); see, e.g., *Delgamuukw v. British Columbia*, 3 S.C.R. 1010 (1997); A.D. Etnison, *Aboriginal Oral History Evidence and Canadian Law*, 6 Central European Journal of Canadian Studies 97.

consultation required when dealing with, or taking actions affecting the rights of, Indian tribes and their members, especially involving water.”¹² The Memorandum then expressly notes the relevancy of this argument to the issue of the protection of cultural resources.¹³ The Memorandum discusses its application to the “area surrounding the proposed North Trend Expansion” and cites to Chief Red Cloud’s testimony that “the entire area including and surrounding the existing Crow Butte mine and the North Trend expansion site was occupied and controlled by the Great Sioux Nation for many generations preceding the landing of Columbus in 1493. Accordingly, the Sioux people are considered the original inhabitants of the area.”¹⁴ The testimony of Chief American Horse is also cited for these historic facts.¹⁵ The Memorandum then proceeds to discuss in extensive detail the basis and scope of the NRC’s obligation as an agency of the United States to engage in consultation with the Oglala Lakota over the impacts upon them by CBR’s activities licensed by the NRC.¹⁶ The Memorandum expresses the position of the Tribe, and Consolidated Intervenor, on this duty to consult which is the underlying obligation that the NRC Staff was attempting to comply with when it engaged in its defective cultural resource survey and survey procedure. Contrary to the NRC Staff’s argument, the Memorandum is not being offered here for the purposes of asserting Tribal ownership and right

¹² Exhibit INT-030, p. 1.

¹³ *Id.* (North Trend Contention C).

¹⁴ Exhibit INT-030, p. 2.

¹⁵ *Id.*

¹⁶ Exhibit INT-023, pp. 3-49.

of control over these ancestral lands.¹⁷ Rather, the Memorandum goes directly to the consultation issue, EA Contention 1.

These exhibits are from proceedings in 2008, over 6 years prior to the issuance of the NRC Staff's issuance of its Environmental Assessment upon the Crow Butte Renewal application. They not only provide background to EA Contention 1, but are evidence that the NRC Staff was informed of the historic and cultural ties of the Oglala Sioux to the Renewal area and was informed, in great detail, of the heavy obligation of the NRC Staff to engage in meaningful consultation with the Oglala Sioux over the impacts of CBR's activities upon the historic and cultural resources in the area and the interests of the Oglala Lakota peoples and Tribe in those resources.

For these reasons, the NRC Staff's Motion in Limine should be denied as to exhibits INT-023, INT-024, INT-025, and INT-030.

C. EA Contention 1 Exhibits INT-27, INT-028, and INT-029

The NRC Staff also seeks to have excluded as irrelevant exhibits INT-027, INT-028, and INT-029, which are from the *Powertech* matter. The relationship between the *Powertech* matter and the EA Contention 1 here was discussed at length in the Consolidated Intervenor's and Oglala Sioux Tribe's Joint Position Statement, pages 83-86.¹⁸ There, as here, the contention was the sufficiency of procedure and consultation employed by the NRC Staff with the Oglala Sioux

¹⁷ See, former OST EA Contention F; *Crow Butte Resources, Inc.* (License Renewal for the In-Situ Leach Facility, Crawford, Nebraska), LBP-15-11, 81 NRC ____ (slip op. at 11-12) (March 16, 2015) (LBP-15-11).

¹⁸ *Crow Butte Resources, Inc.* (License Renewal for the In-Situ Leach Facility, Crawford, Nebraska), ASLBP No. 08-867-02-OLA-BD01 (Consolidated Intervenor's and Oglala Sioux Tribe's Joint Position Statement, pp. 83-86) (March 30, 2015) (ML15131A041).

Tribe, and other tribes, in conducting the cultural resources survey.¹⁹ As discussed in the Joint Position Statement, pages 83-86, the cultural resource surveys for the Crow Butte Renewal – and the North Trend expansion – were done simultaneously, together, with Powertech by the same entities and persons for the NRC Staff. In other words, the *procedures* and the *scope employed* by the NRC Staff was identical for both Powertech and the Crow Butte Renewal. Exhibits INT-027 and INT-028 are the transcripts of the evidentiary hearing on that contention, particularly on the substantive deficiencies of the employed procedure and scope. On April 30, 2015, the Board found upon the evidence from that hearing that the consultation *process* used by the NRC Staff was inadequate and did not meet the NRC Staff’s full legal obligation to consult discussed above in the Memorandum exhibit, INT-030:

The FSEIS has not adequately addressed the environmental effects of the Dewey-Burdock project on Native American cultural, religious and historic resources, and the required meaningful government-to-government consultation between the Oglala Sioux Tribe and the NRC Staff has not taken place. Because of these facts, procedures must be put in place to assure that the required NEPA hard look is taken, the NRC’s Part 51 environmental regulations are satisfied, and an opportunity for meaningful consultation is provided.

...Meaningful consultation between the NRC Staff and the Oglala Sioux Tribe may still be undertaken to identify and mitigate any potential harm to Sioux cultural, historical or religious sitesWe therefore conclude that additional consultation between the NRC Staff and the Oglala Sioux Tribe is necessary. This additional consultation is required in order to 1) to satisfy the hard look at impacts required by NEPA and to supplement the FSEIS, if necessary, and 2) to satisfy the consultation requirements of the NHPA.

The NRC Staff can remedy this deficiency in the Record of Decision in this proceeding by promptly initiating a government-to-government consultation with the Oglala Sioux Tribe to identify any adverse effects to cultural, historic or religious sites of significance to the Oglala Sioux Tribe that may be impacted by the Powertech Dewey-Burdock project. This would then ...allow the adoption of mitigation measures, as necessary. The FSEIS and Record of Decision in this case must be supplemented, if necessary, to include any cultural, historic or religious

¹⁹ *Id.*

sites identified and to discuss any mitigation measures necessary to avoid any adverse effects.

Finally, given our conclusion that the inadequate discussion of potential impacts to Sioux cultural, historical or religious sites in the FSEIS or Record of Decision is a significant deficiency in the NRC Staff's NEPA review, this Board could require the immediate suspension of the issued materials license.²⁰

The Board never reached the issue of whether or not the cultural resource survey was substantive sufficient as it was *procedurally insufficient*, thereby rendering the survey that was completed defective by its very nature. This is the point that the NRC Staff misses in its Motion in Limine. The NRC Staff contends that the Powertech matter is irrelevant to the actual existence of impacted cultural resources at the Crow Butte Renewal site.²¹

The NRC Staff is at least partly at fault for the failed consultation process. For the past five years the Oglala Sioux Tribe has raised its concerns with the consultation process, and yet the NRC Staff has not held a single consultation session, on a government-to-government basis, solely with members of the Oglala Sioux Tribe. Instead, the NRC Staff has held three face-to-face sessions with multiple tribes concerning multiple ISL projects in both South Dakota and Nebraska.²²⁴ The three meetings cited by the NRC Staff as government-to-government consultations were large group meetings, with members of many diverse tribes, all with varying degrees of attachment to the Black Hills area of South Dakota. Though numerous letters were sent to the Oglala Sioux Tribe, as detailed above, quantity does not necessarily equate with meaningful or reasonable consultation, and “doesn’t in itself show the NHPA-required consultation occurred.”²²

It was the identical defective cultural review process jointly employed by the NRC Staff for both sites, together, that is at issue here, and in *Powertech*, not the existence of cultural resources at the CBR Renewal site. For that reason, exhibits INT-027 and INT-028 are clearly

²⁰ *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Facility), LBP-15-16, Dkt. No. 40-9075, ASLB No. 10-898-02-MLA-BD11, 81 NRC ____ (ML15120A299), at 42-44.

²¹ NRC Staff Motion in Limine, p. 9 (“That testimony is not relevant to the identification of cultural resources at the existing Crow Butte facility in Crawford, Nebraska.”)

²² *Powertech USA, Inc.*, *supra* at 40-41.

relevant to this matter, as is exhibit INT-029, which is the statement of the Tribe's Tribal Historic Preservation Officer, Wilmer Mesteth, on the problematic procedure employed by the NRC Staff in conducting its defective cultural resources survey for both the Powertech and the Crow Butte Renewal sites.

The Powertech transcript, INT-028, not only contains the testimony of Mr. Mesteth on this issue, but also contains the extensive testimony of his successor THPO, Michael Catches Enemy, on the defective procedure employed by the NRC Staff.²³ Further in the written submissions in this matter of Mr. Catches Enemy²⁴ and his successor THPO, Dennis Yellow Thunder²⁵, both reference the participation of Mr. Mesteth as their predecessor THPO in their discussions of the defective joint Powertech/Crow Butte cultural resources survey procedures employed by the NRC Staff. The statement of Mr. Mesteth, INT-029, provides background material to the statements of witnesses Catches Enemy and Yellow Thunder in regards to EA Contention 1 in this matter.

For these reasons, the NRC Staff's Motion in Limine as to exhibits INT-027, INT-028, and INT-029, should be denied.

D. Contention D Exhibit OST-001

²³ INT-028: (Mesteth: 755-56, 764-67, 815), (Catches Enemy: 779-94, 799-803, 813-16, 825-26, 853-54, 861-64).

²⁴ INT-031.

²⁵ INT-032.

Finally, the NRC Staff asserts that portions of exhibit OST-001, the statement of Charmaine White Face, should be excluded as not relevant to EA Contentions D, or 9.²⁶

Ms. White Face is a member of the Oglala Sioux Tribe and a physical scientist and biologist with additional training in chemistry and microbiology.²⁷ She has conducted ground water quality studies on the Oglala Sioux Reservation, particularly in regards to substances associated with the 30-years of in situ uranium mining activities at its Crow Butte facility which is upstream from the Reservation.²⁸ She concluded from her studies that the groundwater on the Oglala Sioux Reservation has been contaminated by radioactive substances from the Crow Butte facility.²⁹

EA Contention D concerns the issue of whether or not the Basal Chadron aquifer, where Crow Butte's in situ mining occurs, communicates with the aquifer which supplies drinking water to the Oglala Sioux reservation and results in the possibility of contamination of the potable water on the Reservation. Clearly, evidence that after some 30-years of Crow Butte's in situ mining of the Basal Chadron the underground sources of drinking water on the Reservation have in fact been contaminated by Crow Butte's activities would certainly be relevant to the issue of whether the aquifer's communicate and whether or not the potable water on the Reservation is at risk of contamination. As noted in the Contention, this would by nature render the NRC Staff's environmental justice analysis insufficient as it did not consider at all the Native population residing on the Reservation in its environmental justice analysis.

EA Contention 9 challenges the NRC Staff's EA discussion of ground water restoration mitigation measures. The NRC Staff's EA discussion wholly fails to discuss ground water

²⁶ NRC Staff Motion in Limine, pp. 13-14.

²⁷ OST-001, p. 1.

²⁸ OST-001, generally.

²⁹ OST-001, 8.

contamination of the Reservation nor mitigation measures that could be taken to avoid or alleviate or respond to such contamination. Ms. White Face's statement is certainly relevant to that discussion.

For these reasons, the NRC Staff's Motion in Limine as to exhibit OST-001 should be denied as well.

III. CONCLUSION

For all the foregoing reasons, the Board should deny the NRC Staff Motion in Limine as to exhibits INT-023, INT-024, INT-025, INT-027, INT-028, INT-029, INT-030, and OST-001.

Dated this 25th day of June, 2015.

Signed (electronically) by Andrew B. Reid

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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 THE OGLALA SIOUX TRIBE'S RESPONSE TO NRC STAFF'S MOTION IN LIMINE TO EXCLUDE CERTAIN EXHIBITS FILED BY CONSOLIDATE INTERVENORS AND THE OGLALA SIOUX TRIBE were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: June 25, 2015.

Signed (electronically) by Andrew B. Reid

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