

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

CROW BUTTE RESOURCES, INC.

(License Renewal for the

In Situ Leach Facility, Crawford, Nebraska)

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Docket No. 40-8943

ASLBP No. 08-867-02-OLA-BD01

May 8, 2015

Declaration of Michael CatchesEnemy

1. My name is Michael CatchesEnemy.
2. I am a member of the Oglala Sioux Tribe which is located on the Pine Ridge Reservation where I also live, within the 50 mile radius of the Crow Butte Resources, Inc. ("CBR") in situ uranium mining facility south of Crawford, Nebraska.
3. Though I am reluctant culturally to state this in a legal document, for the purposes of establishing my background as an expert witness for my people, I reveal the following. I was chosen as a leader by my *Tiospaye* (extended family) to be a practitioner of the Spotted Eagle way for our family, of the *Oglala Lakota Oyate*, along with the seven sacred ceremonies, which includes being a leader of the sun dance ceremony. I am the proud descendent of several *Lakota Itacan / Naca* (Headsmen) such as Big Ribs, Gall, Catches Enemy, Hump, Two Bulls, and *Lakota Wicasa Wakan* (Medicine Men) such as Red Flying, Belt, Catches Enemy, Two Bulls, and Helper.
4. I am a Master's Candidate in Cultural Resource Management Archaeology at St. Cloud State University, St. Cloud, Minnesota, fulfilling all graduation requirements and completing final edits to my successfully defended thesis on "*Traditional & Naturally Significant Places process primer*" with my Graduate Committee. I earned a B.S. in Environmental Science from Oglala Lakota College Department of Math and Science in Kyle, South Dakota in May of 2003, with earned credits from Colorado State University's Department of Natural Resources, January 2000 to December 2001, then transferring to Oglala Lakota College.
5. From May of 2004 to March 2012, I have served as the Natural Resources Director of the Oglala Sioux Tribe Natural Resources Regulatory Agency. As Natural Resources Director I identified, updated and developed tribal legislation for the protection, conservation and

		United States Nuclear Regulatory Commission Official Hearing Exhibit CROW BUTTE RESOURCES, INC. (License Renewal for the In Situ Leach Facility, Crawford, Nebraska)
In the Matter of: ASLBP #: 08-867-02-OLA-BD01 Docket #: 04008943 Exhibit #: INT-031-00-BD01 Admitted: 8/18/2015 Rejected: Other:	Identified: 8/18/2015 Withdrawn: Stricken:	

management of natural and water resources. I enforced tribal environmental and natural resource laws and ensured that the Tribe's water and other natural resource rights are protected, including those within the "treaty lands" secured to the Tribe by the 1851 and 1868 Treaties. I also served as the Tribal representative to the Missouri River Recovery and Implementation Committee.

6. I have been invited to participate in many regional panels and seminars including a panel on "Paradigms for Water Quality and Health Concerns in Indian Country," at the 4th Annual William H. Veeder Memorial Conference on Indian Water Rights (2007), to which I was a founding Board Member of the Great Plains Tribal Water Alliance (2005-2012) between the Oglala, Rosebud and Standing Rock Sioux Tribes. I also serve as an Instructor on the "Human Dimensions of Natural Resources," Seminar on the Planning & Management of Tourism in Protected Areas, Warner College of Natural Resources, Colorado State University (2014 & 2015). I am an Adjunct Faculty with Oglala Lakota College presently, teaching such courses as "People and the Environment", "Cultural Resource Management", and "Lakota and the Environment" under both Departments of Math & Science and Lakota Studies.

7. Helped to establish the Oglala Sioux Tribe's first Tribal Historic Preservation Office and served as its first Historic Preservation Officer (THPO) from May 2009 – January 2010, as well as from October 2013 – April 2015, and continue my role in the preservation of historic, cultural, and spiritual resources of the Tribe as the first Tribal Archaeologist for the Cultural Affairs & Historic Preservation Office. In my activities as the former THPO, I regularly reviewed cultural resource reports and surveys, including the survey and reporting methods. I worked closely with my THPO predecessor, Wilmer Mesteth (January 2010 – October 2013), and continue to with my successor, Dennis Yellow Thunder, including the review of the in situ uranium mining activities at Dewey-Burdock in the Black Hills and the Crow Butte activities near Crawford, Nebraska.

8. The Oglala Sioux Tribe is a sovereign indigenous nation and body politic comprised of approximately 41,000 citizens with territory of over 4,700 square miles in the southwestern portion of South Dakota. The Tribe also claims the territory and lands within the 1851 and 1868 Ft. Laramie treaties, including the lands upon which the CBR facility is located and operates. The United States of American acknowledges a nation-to-nation relationship with the Tribe.

9. The Oglala Sioux Tribe is the elected government of the Oglala Lakota people, with a governing body recognized by the United States of through the Secretary of the Interior. The federal recognized Oglala Sioux Tribe is the successor in interest to the Oglala Band of the Teton Division of the Sioux Nation. The Oglala Band reorganized in 1936 as the "Oglala Sioux Tribe of the Pine Ridge Indian Reservation" under section 16 of the Indian Reorganization Act of June 18, 1934, Ch. 576, 48 Stat. 987, 25 U.S.C. § 476, and enjoys all of the rights and privileges guaranteed under its existing treaties with the United States in accordance with 25 U.S.C. § 478b. Its address is P.O. Box 2070, Pine Ridge, South Dakota 57770-2070.

10. The United States has imposed protectorate relationship upon the Tribe by which the United States has assumed trust responsibilities with the Tribe and its people as the beneficiaries, including the protection of the Tribe, its water and other natural resources, its historic, cultural, and spiritual interests, and the health and well-being of the Oglala Lakota.

11. In 1992, the United States Congress adopted amendments to the National Historic Preservation Act (“NHPA”) (P.L. 102-575) that allow federally recognized Indian tribes to take on more formal responsibility for the preservation of significant historic properties on tribal lands. Specifically, Section 101(d)(2) allows tribes to assume any or all of the functions of a State Historic Preservation Officer (“SHPO”) with respect to tribal land for the purposes of the Act. Through that provision of the NHPA, the United States has recognized the responsibility and authority of the designated THPOs, and specifically for the Oglala Sioux Tribe in September 2009 in enforcing the obligations of the United States and its agencies under the NHPA and other federal laws enacted to protect and preserve Native American interests in water, other natural resources, historic and cultural sites and items, and the practice of indigenous culture, religion and spirituality. The Oglala Sioux Tribe’s THPO further exercises the inherent sovereign authority of the Tribe recognized by the United States in treaties with the Tribe and in its continuing nation-to-nation relationship with the Tribe.

12. I am familiar with the license renewal application submitted to the US Nuclear Regulatory Commission (“NRC”) by CBR for the continuation of its activities at its in situ uranium mining facility south of Crawford, Nebraska.

13. As previously stated, the lands encompassed by the application are within the Territory and ancestral lands of the Great Sioux Nation (the Seven Council Fires), which includes the band of the Oglala Lakota (the Oglala Sioux Tribe) as acknowledge by the United States in the Ft. Laramie treaties of 1851 and 1868. As a result and despite being physically and illegally dispossessed of current possession of the Treaty lands lying outside the existing Reservation border, the Tribe continues to possess ancestral, historic, cultural, religious, and spiritual interests and relationship with those lands and the historic and cultural resources, artifacts, sites, etc., found thereon belong to the Tribe and, collectively, the other Sioux bands. The Tribe concedes neither title to nor sovereignty to the United States over these treaty lands. In addition to interests protected by treaties with indigenous nations, the United States by enacting the National Environmental Policy Act (“NEPA”) (42 U.S.C. §§ 4330 et seq.), the Native American Graves Protection and Repatriation Act (“NAGPRA”) (25 U.S.C. §§ 3001 et seq.), the NHPA (16 U.S.C. §§ 470 et seq.), the American Indian Religious Freedom Act (“AIFRA”) (42 U.S.C. § 1996), the Religious Freedom Restoration Act (“RFRA”) (42 U.S.C. §§ 2000bb et seq.), and other statutes, has assured that the historic and cultural resources and cultural, religious, and spiritual interests of a tribe will be protected, even when they are not within reservation boundaries. Any harm done to these resources and interests of the Oglala Lakota peoples by the activities of CBR will be an injury to the Tribe caused by the Applicant

and condoned by the NRC, the Tribe's trustee under the United States' assumed trust relationship.

14. The site of the Crow Butte activities is historically significant as it is within the area utilized by the Sioux as an encampment during period of forced removal by the United States of the Sioux from their ancestral lands and during the existence of Fort Robinson and the "sign or starve" treaty-making tactics of the United States in the mid to late 1800s. Given the large encampment, it can be reasonably presumed that many sites and artifacts of significant historic and cultural importance to the Tribe exist in the area that encompasses the existing Crow Butte facility and the surrounding Crow Butte and Crawford area.

15. Crow Butte itself is considered by the Lakota and other tribes to be a sacred peak used to this day by members of the Tribe for vision quests and spiritual awareness. Like all such indigenous sites of great spiritual value and importance, including Bear Butte, Owl Maker Butte (commonly known as Harney Peak), Bear's Lodge (commonly known as Devil's Tower), and many others for example, the mere presence of industrial activity in the vicinity significantly infringes upon the spiritual experience. This is even more so when, like Crow Butte, the activity requires frequent traffic in the immediate area and is destructive of the earth, water, flora, fauna, and the environment.

16. NHPA and these other federal laws require "consultation" with the Oglala Sioux Tribe, and other affected tribes, regarding the existence and protection of such cultural resources and interests. As the holders of lawful title and sovereignty over all of the Treaty lands, including the lands where the Crow Butte facility is located, the Tribe's position is that "consultation" is for the purpose of the United States and its agencies obtaining the free, prior, and informed "consent" of the Tribe as to actions that may affect Tribal interests, as required by the UN Declaration on the Rights of Indigenous Peoples, signed by the United States, and the International Convention on the Elimination of All Forms of Racial Discrimination, signed and ratified by the United States.

17. Without compromising the Tribe's position, I am aware that the United States and its agencies do not consider the term "consultation" as requiring the consent of the affected tribe. It is within the context of that understanding and the more limited consultation obligations acknowledged by the United States that the following comments are made. I am familiar with the "consultation" process used by the NRC Staff and the private contractor, SRI Foundation, employed by the Applicant in regards to this matter. That process largely consisted of various invitations beginning in early 2011 by the NRC Staff and SRI to engage in a predetermined consultation process, including meetings, telephone and written communications, and participation in archeological field surveys, that combined the review of the Crow Butte license renewal with the Crow Butte expansion, known as the North Trend, and the Dewey-Burdock project. The NRC Staff had already been in communications with the Tribe since 2009 on the Dewey Burdock license application.

18. An “information gathering” meeting for numerous tribes on these three license applications was conducted by the NRC Staff in early June 2011. The meeting was held on the Pine Ridge Reservation and attended by the Oglala Sioux Tribe. Another meeting with the NRC Staff organized by SRI was held in Rapid City, South Dakota, in mid-February 2012, again on all three projects at which time the NRC requested a “statement of work” from each tribe. At that meeting, the participating tribes, including the Oglala Sioux Tribe, emphasized the nation-to-nation relationship of each tribe with the United States and objected to the roles that the Applicant and its contractor, SRI, were taking in the Section 106 process. The tribes further required that knowledgeable tribal representatives, including tribal elders and spiritual leaders, rather than just archaeologists conduct the cultural surveys under appropriate conditions and circumstances approved by each tribe. The tribes, caucusing among themselves, also stated the requirement that the process include all tribes participating together collaboratively in respect for their collective interests rather than being divided by the survey process suggested by SRI and the NRC Staff.

19. A follow-up conference call was held between the tribes, including the Oglala Sioux Tribe, and the NRC Staff, the Applicant, and SRI in late April 2012, again on all three projects. The tribes restated their requirement that the surveys be conducted according to an appropriate process developed by the tribes, not the Applicant or SRI. Supplemental conference calls were conducted in early and late August 2012 during which the tribes objected to the statement of work that was presented to them by the NRC Staff, including modifications that were made by the NRC Staff / SRI without discussion to a statement of work submitted by participating tribes. Many of the aspects of the revised statement of work presented to the tribes were simply not feasible. The tribes distinguished between approaches that identify archaeological sites and those that identify places and items of spiritual and cultural significance to them and emphasized to the NRC Staff that the statement of work needed to come from the tribes, not the NRC or SRI. The tribes discussed the need for government to government meeting with the NRC and a programmatic agreement between the United States and the indigenous nations responsive to their concerns.

20. Despite all of these problems and the lack of an acceptable statement of work or a programmatic agreement, the NRC Staff, SRI, and the Applicant went ahead with setting up site visits for “field studies” in November and December of 2012. The Applicant stated that it would pay \$10,000 to each tribe that agreed to participate. Only two tribes accepted the offer for a site visit under the conditions presented by the NRC Staff and SRI. Then, in late December 2012 and early January 2013, the NRC Staff sent out new Section 106 “consultation” letters to the tribes, including the Oglala Sioux Tribe.

21. On February 20, 2013, Mr. Terry Clouthier, the Tribal Archaeologist for the Standing Rock Sioux Tribe, sent the NRC a letter condemning the Section 106 process employed by the NRC Staff, SRI, and the Applicant in regards to the Dewey-Burdock project, the same Section 106 process employed in regards to the Crow Butte license renewal and North Trend

applications. Mr. Clouthier stated: "This current proposal is just short of a bribe disguised as a token identification effort. It calls into question the entire integrity of the 106 process." Mr. Clouthier also notes that the NRC failed to take seriously the process endorsed by the tribes to identify culturally and spiritually significant sites and resources. I fully agreed with Mr. Clouthier's assessment and comments as they would apply to the identical Section 106 process used by the NRC Staff for the Crow Butte license renewal.

22. The following month, on March 15, 2013, Roberta Joyce Whiting, Project Review Officer, for the Tribe's Historic Preservation Office, in respect for the collective interests and approach of all of the tribes, notified the NRC Staff that the Oglala Sioux Tribe would refuse to participate in the field surveys since the other tribes were not participating. That was followed by a formal letter from Oglala Sioux Tribal President, Bryan V. Brewer, Sr., to the NRC on March 22, 2013, expressing the sovereignty of the Tribe over treaty lands and the right to act collaboratively with the other tribes, the Seven Council Fires, to protect traditional cultural interests on their aboriginal homelands and territories. President Brewer then stated similar objections to the Section 106 process being employed by the NRC Staff as those stated by Mr. Clouthier. Another letter was sent by President Brewer on March 29, 2013 expressing the special relationship and interests of the Tribe and its members to the lands under NRC review.

23. In late May, 2013, the NRC Staff finally conducted government-to-government consultations in Rapid City with the Oglala Sioux Tribe and the other tribes over all of the pending license applications, including the Crow Butte license renewal. However, those consultations were unsuccessful in resolving the differences between the tribes and the NRC Staff over the process being employed to determine the impact of the Crow Butte activities and the two other proposed projects on the tribal historic, cultural, religious, and spiritual interests.

24. Despite the complete breakdown of the consultation process and without a historic, cultural, religious, or spiritual survey of the impacted areas that included the collective participation by the affected tribes, including the Oglala Sioux Tribe, the NRC Staff and the Applicant went ahead with the preparation and issuance in 2014 of the Safety Evaluation Report ("SER") and the Environmental Assessment ("EA") and approval of renewal of the Applicant's license. No draft EA was circulated that might have provided an additional opportunity to resolve these disputes between the tribes, including the Oglala Sioux Tribe, and the NRC Staff and the Applicant. Without the collaborative participation of the tribes, including the Oglala Sioux Tribe, no adequate comprehensive study identifying all such resources could be conducted by the NRC Staff or the Applicant.

25. According to the EA, archaeological surveys were conducted by state agencies in the 1980s. Those surveys identified "21 prehistoric and historic period archaeological sites," of which 15 were evaluated by the state agencies as "not eligible" for nomination and potential listing on the National Register of Historic Places. It was reported that between 2010 and 2012 the Applicant visited the 6 sites that are potentially eligible and "confirmed" that the sites did not incur any impacts from activities there through 1995. The EA does not describe any uniform or

scientifically-verified methodology employed by these surveys, nor explain any methodology or scientific basis for the selection of certain cultural resources as significant or eligible for listing on the National Register, while others are not granted such protections. Further, the “confirmation” by the Applicant, not the NRC Staff, of no impacts on the 6 eligible sites only covered the period through 1995. These surveys also failed to identify the “sign or starve” Lakota encampments of the 1880s.

26. Archaeological surveys are not cultural resource surveys and are not sufficient to identify all sites and resources of historic, cultural, and spiritual significance to tribes. The EA acknowledges the historic interests of the Oglala Lakota in Crow Butte, a mere one-half mile east of the Crow Butte license area. It also acknowledges the spiritual and religious importance of Crow Butte as a place used by the Lakota for vision quests and of the area for the collection of herbs for medicinal and ceremonial uses. The EA acknowledges that only two tribes engaged in field reviews. Both of those tribes, the Santee and the Crow, were not among those tribes closed to the area and having the greatest historic contact with the area. These surveys were not sufficient to identify spiritual, cultural, and historic resources significant to the Oglala Sioux Tribe and the other tribes. The failures of the NRC Staff and the Applicant to resolve the disputes with the tribes over the surveys leaves the Tribe’s historic, cultural, and spiritual resources at risk of harm, including permanent destruction. The failures of the NRC Staff to obtain the Tribe’s participation deprives the EA of any mitigation measures or other plans to diminish impacts to the Tribe’s historic, cultural, and historic resources at the Crow Butte site.

27. In August 2014, I provided testimony under oath in the Dewey-Burdock license proceeding on the insufficiency of the historic, cultural, and spiritual resources survey process employed by the NRC Staff and the Applicant. Since that same process was used by the NRC Staff and the Applicant for the Crow Butte license renewal application and the North Trend license application, my testimony would be equally applicable to those license applications and the insufficiencies of the process used by the NRC Staff and the Applicant. I incorporate that testimony here by reference.

This Affidavit is submitted in accordance with 10 C.F.R. Section 2.304(d) and 28 U.S.C. Section 1746. I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge.

Executed on May 8, 2015 at Pine Ridge Reservation.



Michael CatchesEnemy