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Comment On: NRC-2012-0281-0005

Crow Butte Resources, Inc.; Marsland Expansion Area; Draft Environmental Assessment and Finding of No Significant Impact; Notice of Availability and Request for Comment

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Government Agency Type: Tribal

Government Agency: Yankton Sioux Tribe

General Comment

See attached file(s)

Attachments

Yankton Sioux Tribe Comments

Ihanktonwan Consultation Wo'ope

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**COMMENTS OF THE YANKTON SIOUX TRIBE ON
THE DRAFT ENVIRONMENTAL ASSESSMENT AND FINDING OF NO
SIGNIFICANT IMPACT FOR THE PROPOSED MARSLAND EXPANSION AREA**

January 29, 2018

INTRODUCTION AND SUMMARY

Thank you for this opportunity to submit comments on the proposed Marsland Expansion Area of the Crow Butte in situ uranium recovery facility near Crawford, Nebraska. These comments are made and submitted on behalf of the Yankton Sioux Tribe and the Yankton Sioux Tribe Treaty Steering Committee (collectively, the "Tribe").

I. Proper, Meaningful Consultation is Required.

As a preliminary matter, the Tribe asserts its position that proper, meaningful consultation with tribes who have an interest in the expansion and surrounding vicinity is mandated under these circumstances by federal laws including Section 106 of the National Historic Preservation Act ("NHPA") and Executive Order 13175. With respect to the Tribe, this requires compliance with the Tribe's *Ihanktonwan* Consultation *Wo'ope*, a set of consultation protocols adopted by the Tribe to govern the consultation process with federal agencies such as the Nuclear Regulatory Commission ("NRC"). A copy of these protocols is attached. The Tribe fully expects the NRC to review and comply with the *Ihanktonwan* Consultation *Wo'ope* and initiate and engage in consultation with the Tribe accordingly. The Tribe is gravely disturbed by the NRC's failure to consult with the Tribe, particularly at this late stage in the National Environmental Policy Act ("NEPA") process. Pursuant to 40 C.F.R. § 1502 and 34 C.F.R. §§

800.1 and 800.2, consultation must begin “early in the planning process.” 36 C.F.R. § 800.2(c)(2)(ii)(A). The NRC has therefore failed in its consultation duties to the Tribe.

II. The Tribe has Significant Treaty, Cultural, and Spiritual Interests in the Area at Issue.

In 1851, the Yankton Sioux Tribe (*Ihanktonwan*) along with other bands of the Great Sioux Nation (*Oceti Sakowin*) entered into a treaty at Fort Laramie (“1851 Treaty”) which reserved to the signatory bands a vast swath of land in present-day in Nebraska, Wyoming, Montana, North Dakota, and South Dakota as a homeland for those indigenous nations. This treaty-reserved homeland included the Black Hills (*He Sapa*) as well as the area currently known as Crawford, Nebraska, and the area where the proposed mine expansion would occur – which is in extremely close proximity to the Black Hills.

Since time immemorial, the Black Hills have been sacred to the *Ihanktonwan*, as well as a plethora of other tribes. For example, the Black Hills contain genesis sites for numerous tribes, and many *Ihanktonwan* have intermarried with these tribes and thus share that reverence for those sites in *He Sapa*, such as Wind Cave. To this day, members of the Tribe continue to use sacred *He Sapa* for a number of spiritual ceremonies, hunting, and harvesting medicinal plants. *He Sapa* is a place of great spiritual and cultural importance such that many if not all of the seven sacred rites of the *Ihanktonwan* - and all *Dakota*, *Lakota*, and *Nakota* - have been practiced there.

Because of its proximity to the Black Hills and the intensive historic use of the Black Hills by tribal members since time immemorial, the location of the proposed mine expansion is highly likely to include sacred and cultural resources of significance to the Tribe. These resources may include sites for ceremony, sites of burials, and historically significant sites as well as animals and plants which tribal members have usufructuary rights to hunt and gather.

The proposed expansion project could potentially devastate the Tribe's resources, in turn devastating the Tribe and making tribal consultation and tribal input all the more vital. The Tribe's cultural resources are protected in part by the NHPA, and the rights to hunt and gather on this territory was reserved to tribal members through the 1851 Treaty and have never been abrogated by Congress. The Tribe therefore has legally protected interests – the rights to hunt, gather, and perform ceremony - in the 1851 Treaty territory which includes the proposed expansion area. These rights must be respected. Because the Project proposes to conduct significant ground-disturbing activities, it poses a grave threat to the Tribe's culture, spirituality, and treaty rights. Furthermore, pursuant to the NHPA, NEPA (which requires compliance with the NHPA), and Executive Order 13175, the NRC was required to consult with the Tribe throughout its environmental review process for the proposed action.

III. An Environmental Impact Statement is Required.

As described above, the effects of the proposed action are significant and will unlawfully violate the Tribe's treaty rights and desecrate cultural and spiritual resources. Because there will be significant effects, federal law and agency policy mandate that an EIS, rather than a mere environmental assessment, be prepared. The in-depth analysis provided by the EIS process is necessary to properly evaluate the effects and impacts of the proposed action.

IV. The Scope of the NRC's NEPA Analysis Must Be Comprehensive and Include Impacts to Tribal Rights.

The scope of the NRC's NEPA analysis must include a study of the impacts on tribal treaty rights, impacts on tribal cultural and spiritual resources, and environmental justice-related impacts. As previously described, the *Ihanktonwan* and a multitude of other tribes have usufructuary rights in the 1851 Treaty territory, which includes the site of the proposed expansion, and practice traditional ceremonies there. The proposed action would therefore have

a disparate impact on these indigenous populations, which constitute minority and low-income populations, raising significant environmental justice concerns.

Furthermore, cultural resources of significance to these indigenous populations are abundant in this area and are often undocumented. These resources must be protected for the sake of the Tribe's and many other tribes' cultures and spiritualities. To do so requires not only skilled surveys and analysis, but also experience and indigenous perspective. Tribal archaeological surveys must therefore be conducted before a final NEPA determination can be made. The Tribe asserts that each tribe with a cultural and/or historical interest in the 1851 Treaty territory must be permitted to survey the area of potential effects, and such surveys must be funded by the NRC or the project proponent. Surveys should include both plant and animal surveys to determine impacts on usufructuary hunting, fishing, and gathering rights as well as surveys of other types of cultural resources, sacred sites, and burials. Furthermore, the cumulative impacts of the proposed action and "past, present, and reasonably foreseeable future actions" on cultural resources and treaty rights must be considered during the NEPA process. 40 C.F.R. § 1508.7.

CONCLUSION

The Tribe appreciates the opportunity to provide these comments to the NRC and fully expects the NRC to proceed with meaningful consultation and preparation of an EIS in accordance with these comments.



Ihanktonwan Consultation Wo'ope

Protocols for Consultation with the Yankton Sioux Tribe

I. Purpose

The purpose of these protocols is to provide federal agencies with standards with which they must comply when engaging in consultation with the Yankton Sioux Tribe ("Tribe") in order to ensure that consultation is meaningful and will fulfill the purpose and intent of Executive Order 13175 as well as applicable federal statutes, regulations, and agency policies, manuals, and Secretarial Orders. Consultation shall create understanding, commitment, and trust between the parties, and should be used to identify opportunities and solve problems.

II. Scope

The scope of these consultation protocols includes any and all consultation for both federal undertakings, as defined by 36 C.F.R. § 800.16(Y), and other "policies that have tribal implications," as that phrase is defined in Executive Order 13175.

These consultation protocols apply to any effort by a federal agency to consult with the Yankton Sioux Tribe pursuant to federal law(s), including but not limited to the National Environmental Policy Act implementing regulations (40 C.F.R. Part 1500), the National Historic Preservation Act (16 U.S.C. § 470 et seq.) and implementing regulations (36 C.F.R. Part 800), the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 et seq.) and implementing regulations (43 C.F.R. Part 10), the American Indian Religious Freedom Act (42 U.S.C. §§ 1996 & 1996a), the Archeological Resources Protection Act of 1979 (16 U.S.C. §§ 470aa-mm), Executive Order 13175, and Executive Order 12989. For purposes of these protocols, "agency" means any authority of the United States that is an "agency" under 44 U.S.C. § 3502(1).

III. Protocols

A. Cultural Protocols

1. Relationship-building should be at the center of any consultation, as this is a primary cultural protocol for the Ihanktonwan ("Yankton"). Relationship building cannot occur through just one meeting, or by telephone or email. It requires time, trust, and respect for the relationship.
2. Agencies must recognize that water is viewed as the first medicine, and it must be honored and protected. Water is vital to the spiritual practices, culture, and health of the Ihanktonwan.



3. Agencies shall respect the fact that Yankton Sioux Tribal members have experience and knowledge that makes them uniquely qualified to identify Ihanktonwan cultural resources, and shall weigh their views accordingly.
4. Agencies must recognize that certain members of the Tribe possess inherent abilities and historical knowledge passed down through generations that make those tribal members uniquely equipped and able to identify sites of spiritual, cultural, and historical interest. These skills and knowledge should be utilized through tribal surveys of areas that may be impacted by a proposed action.
5. Agencies must recognize and respect the cultural practice of speaking in a “circular” manner, which may mean that it takes time for a speaker to arrive at the ultimate point but which conveys relevant information necessary to a proper understanding of that point.
6. Elders must be respected.
7. Agencies must recognize that the Ihanktonwan practice reciprocity, which means that if remains are unearthed, something must be given back in return to restore balance. There are consequences dictated by the universe for disturbing graves and remains, and this must be avoided.
8. Agencies must respect the practice of making offerings.
9. Sharing a meal at the conclusion of a meeting is customary and expected.

B. Behavioral Protocols

1. Parties shall respect each participant and respect each other’s diversity.
2. Parties shall speak with respect, courtesy, dignity, care, and moderation to maintain an amicable atmosphere.
3. Parties shall avoid the use of language of dominance and/or oppression.
4. Parties shall refrain from disruptive gestures or actions.
5. Parties shall avoid tactics to induce intimidation. This includes manner of dress. Parties should dress in civilian clothing or dress uniform. Fatigues must not be worn.
6. Parties shall treat everyone involved in a consultation meeting, particularly elders, with respect.
7. When an individual is speaking, all parties must refrain from interrupting that individual.



8. Parties shall not be dismissive of any statement made, but rather, shall acknowledge and value all contributions and bring them into consideration in any decision.
9. Parties shall refrain from reaching any decision until consultation has concluded and sufficient information has been exchanged.
10. Parties shall contribute and express opinions with complete freedom.
11. Parties shall carefully examine the views of others and accept valid points when made by others.
12. Parties shall focus on the subject of the consultation and avoid extraneous conversation.

C. Procedural Protocols

1. Consultation shall only include government-to-government, in-person meetings with the Tribe's General Council. Consultation shall not be conducted via telephone or written correspondence unless expressly agreed to by the Chairman of the Tribe in writing.
2. A meeting shall not be considered consultation unless the relevant federal agency is represented at the meeting by an individual with decision-making authority over the proposed federal action at issue.
3. If more than one agency is involved in the federal activity at issue, each agency shall be responsible for fulfilling consultation requirements for any activity under its respective authority. Agencies may appoint a lead agency to coordinate and lead tribal consultation; however, all involved agencies shall participate directly in consultation.
4. Multi-tribal or public meetings shall not be considered consultation unless expressly agreed to by the Chairman of the Tribe in writing unless the meeting is comprised exclusively of the federal agency and the Oceti Sakowin.
5. The consultation process shall commence as early as possible. Initial notification by a federal agency to the Tribe of a proposed action shall occur within two weeks of the federal agency becoming aware of the proposed action.
6. A federal agency shall contact the Chairman of the Tribe and the Ihanktonwan Treaty Steering Committee for the Tribe to notify the Tribe of a proposed federal action and initiate the consultation process. If the proposed federal action is expected to impact tribal cultural, spiritual, or historical resources, the federal agency shall also contact the Tribal Historic Preservation Officer. Notification pursuant to this protocol does not constitute consultation, but merely initiates the consultation process.



7. The consultation process shall include a pre-consultation meeting with the Tribe's Business and Claims Committee at which preliminary information shall be exchanged and an overview of the proposed federal action shall be provided.
8. During or prior to the pre-consultation meeting, the relevant federal agency shall inform the Tribe of the potential impacts on the Tribe of the proposed federal action.
9. During or prior to the pre-consultation meeting, the relevant federal agency shall inform the Tribe of which federal officials will make the final decision with respect to the proposed federal action.
10. Pre-consultation meetings shall be held at the Tribe's Fort Randall Casino on the first Wednesday of each month. Consultation meetings shall be held at the Tribe's Fort Randall Casino on the third Wednesday of each month. Meeting times shall be scheduled on a first-come, first-served basis. An agency shall contact the Tribe's THPO and Secretary's office to determine the next available meeting time and to schedule pre-consultation and consultation meetings.
11. Consultation meetings shall be scheduled at least thirty-five (35) days in advance to allow for adequate notice to the General Council, which is comprised of tribal members age 18 years and older and which is the governing body of the Tribe.
12. All meetings shall be opened with a prayer.
13. All meetings shall be closed with a prayer.
14. All meetings shall be followed by a meal or include a meal as part of the necessary relationship-building.
15. Consultation meetings shall not designate an end time, but shall continue until all have had an opportunity to speak.
16. The federal agency shall provide the services of a court reporter to record each consultation meeting. A transcription of each meeting shall be provided to the Tribe within ten (10) days following said consultation meeting.
17. No party shall unreasonably withhold consent to terminate consultation, but consultation shall continue until meaningful consultation has been achieved.
18. While there is no set number of meetings required for consultation to be deemed sufficient, consultation shall not be considered complete until the parties are satisfied that all necessary information has been adequately exchanged.



19. Consultation shall be completed before any federal funds are expended for the proposed federal action, before the issuance of any license or permit for the proposed federal action, and prior to the agency making any decision or taking any action regarding policies that have tribal implications.

Summary of Consultation Steps:

1. Federal agency learns of proposed federal action that may affect the Yankton Sioux Tribe.
2. Federal agency promptly (within two weeks) notifies the Chairman of the Tribe and the Ihanktonwan Treaty Steering Committee (and the Tribal Historic Preservation Officer for the Tribe if the proposed action is expected to impact tribal cultural, spiritual, or historic resources) of the proposed action. The consultation process is thus initiated.
3. The Chairman and/or his staff schedules a pre-consultation meeting.
4. A pre-consultation meeting is held.
 - a. Opening Prayer
 - b. Meeting
 - c. Closing Prayer
 - d. Meal (may also occur during the midpoint of the meeting)
5. The Chairman or his staff schedules a consultation meeting.
6. A consultation meeting is held.
 - a. Opening Prayer
 - b. Meeting
 - c. Closing Prayer
 - d. Meal (may also occur during the midpoint of the meeting)
7. Federal agency provides the Chairman of the Tribe with a transcript of the consultation meeting within 10 days.
8. Repeat steps 5-7 until meaningful consultation has been fully achieved.

D. Governmental Protocols

1. Federal agencies shall respect the unique legal and political relationship between the United States and the Tribe.
2. Consultation shall be meaningful and shall include collaboration with tribal officials.



3. The Tribe's views shall be incorporated into a federal agency's decision-making process.
4. Consultation shall be conducted and resulting agency decisions shall be made in such a way that the government-to-government relationship between the Tribe and the United States is strengthened. The Tribe shall be considered as a collaborative partner with the federal agency.
5. Federal agencies shall recognize the Tribe's right to self-government and its inherent sovereign powers. Federal agencies shall be respectful of the Tribe's sovereignty.
6. Federal agencies shall acknowledge and abide by the treaties between the United States and the Tribe.
7. Federal agency actions during and after consultation shall reflect the trust responsibility of the United States to the Tribe.

IV. Compliance

All parties shall comply with the protocols contained herein when engaging in the consultation process. Should a party fail to comply with one or more protocols, the other party shall notify the non-compliant party of the violation and the parties shall mutually agree upon a time and location for a meeting between the parties to resolve the matter. The goal of this meeting shall be to restore balance and reduce or eliminate discord by talking through the violation and reaching a mutual understanding to move forward in compliance with the protocols.