



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

January 25, 2019

Mr. Tom Brings
and Mr. Kyle White
Tribal Historic Preservation Office
Oglala Sioux Tribe
PO Box 320
Pine Ridge, SD 57770

SUBJECT: RESPONSE TO OGLALA SIOUX TRIBE'S LETTER DATED JANUARY 11, 2019, REGARDING THE IMPLEMENTATION OF THE U.S. NUCLEAR REGULATORY COMMISSION'S MARCH 2018 APPROACH TO IDENTIFY HISTORIC, CULTURAL, AND RELIGIOUS SITES AT THE DEWEY-BURDOCK IN SITU URANIUM RECOVERY PROJECT IN FALL RIVER AND CUSTER COUNTIES, SOUTH DAKOTA (DOCKET NUMBER: 40-9075)

Dear Mr. Brings and Mr. White:

On January 11, 2019, the U.S. Nuclear Regulatory Commission (NRC) staff received the Oglala Sioux Tribe's response (Agencywide Documents Access and Management System [ADAMS] Accession Number ML19011A459) to the NRC's November 21, 2018, letter (ADAMS ML18325A029). In its November 21 letter, the NRC staff reaffirmed its commitment to continue discussions with the Tribe to develop a physical site survey methodology to identify sites of historic, cultural, and religious significance that could be affected by the Dewey-Burdock in situ uranium recovery (ISR) project. In the interest of further focusing the important next steps in these negotiations, we provide the NRC staff's perspective on several topics raised in the Tribe's January 11 response.

The November 21 letter provided background information regarding the proposed methodology discussed during the June 2018 teleconference calls and webinars, and meetings in Pine Ridge, South Dakota, as a starting point for ongoing discussion, negotiation, and modification. As that letter explained, the proposed methodology is consistent with the parameters established in the NRC staff's March 16, 2018, approach (March 2018 Approach; ADAMS ML18074A393), which was accepted as reasonable by the Tribe, Consolidated Intervenor, and Powertech (USA), Inc. It is also consistent with the October 30, 2018, Atomic Safety and Licensing Board's (Board's) Order regarding the scope of the discussions and negotiations, which states that "the only aspect of the Approach that is open for discussion is the site survey methodology. That is, any tribal negotiating position or proposal should only encompass the specific scientific method that would fit into the two-week periods set out in the March 2018 Approach for visiting the physical site, i.e., how the contractor and Tribe members will walk the site and mark or record located tribal resources."

In the November 21 letter, the NRC staff requested that by December 28, 2018, the Tribe document its specific concerns with the proposed methodology in writing, or propose an alternative methodology that the Tribe would consider scientific and reasonable but that would

also fit within the parameters of the March 2018 Approach and the Board's October 30, 2018, Order. At the request of the Tribe, the response date was extended to January 11, 2019. Also in its November 21 letter, the NRC staff acknowledged the Tribe's interest in revising the protective order. On December 12, 2018 (ADAMS ML18347A047), the NRC staff requested the Tribe's views regarding any need for changes to the protective order be submitted by the same date.

The NRC staff remains committed to an open dialogue regarding the development of a site survey methodology and revising the protective order. The NRC staff appreciates that the January 11 response provided the Tribe's views on a variety of matters. The NRC staff is, however, concerned that the Tribe did not detail its concerns with the proposed site survey methodology or specify input on amendments to the protective order that would resolve the Tribe's views regarding confidentiality. It was the NRC staff's intention, using the Tribe's response to effectively focus additional discussions and negotiations, to reach an agreement on a site survey methodology by March 1, 2019, and, in parallel, to begin working with the Tribe on a coordinated motion to modify the protective order before the execution of the site survey, should the Tribe deem such a motion necessary. Consequently, the NRC staff still considers its proposed methodology, as described in the November 21 letter, to be the appropriate foundation for continuing those negotiations.

In light of certain views the Tribe shared in its January 11, 2019 response, the staff offers the following clarifications to help facilitate the upcoming negotiations.

Cultural Resource Survey Methodology and Roles of the Tribe and Contractor

The Tribe's January 11 letter appears to suggest that the Tribe is being asked to "voluntarily provide uncompensated contractor services by proposing, preparing, and implementing the survey methodology on the ground." Tribe's Response at Page 5. On the contrary, the March 2018 Approach reflects the NRC staff's ongoing central responsibilities for developing, facilitating, and implementing the survey methodology, including contractor support to enable that effort, while at the same time recognizing the importance of the Tribe's expertise in the development of a site survey methodology. The Tribe's response also asserted that the NRC staff "Has Provided No Cultural Resource Survey Methodology". Tribe's Response at Page 2. However, the NRC staff's November 21, 2018 letter proposed and explained the reasoning for each step of a survey methodology, based on a proposal prepared by Dr. Nickens that was previously discussed during the June 2018 teleconference calls and webinars. The proposal in the letter was intended to be a starting point for further discussion and negotiation.

In its January 11, 2019, response, the Tribe stated that its own June 15, 2018, proposal contains "key elements" and looks forward to an NRC contractor providing "a detailed proposal to address the elements that must be present." Tribe's Response at Page 7. The June 15, 2018, proposal, however, outlines a methodology that is incompatible with the scope, timeline, and costs of the NRC staff's March 2018 Approach (as discussed in the NRC staff's July 2, 2018, response to the Tribe (ADAMS ML18183A304)), and the Board's October 30, 2018, Order.

With regard to the staff's contractor, as previously discussed, the NRC staff awarded a contract to SC&A, Inc. to facilitate implementation of the March 2018 Approach. An SC&A, Inc. employee will work with the Tribe to develop and conduct the survey

because, as reiterated by the Tribe in its letter dated May 31, 2017 (ADAMS ML17152A109), the expertise of the Tribes is essential in the development and implementation of a meaningful and comprehensive tribal cultural survey. The NRC staff recognizes that Tribes have the unique expertise to identify, interpret, and ascribe significance to resources, and there is no substitution for the Tribes' expertise. The NRC staff accordingly awarded a contract to a company experienced in planning, performing, and reporting surveys to assist in developing and implementing the survey methodology and survey report, rather than requesting the Tribe to solely and voluntarily develop, prepare, and implement the site survey methodology.

Additionally, as previously discussed, Mr. Jerry Spangler has replaced Dr. Nickens after he resigned from SC&A, Inc. Enclosed please find Mr. Spangler's most recent resume (Enclosure 1).

Confidentiality and Protective Order

In its November 21, 2018, letter, the NRC staff reaffirmed its commitment to protect sensitive and confidential information associated with the tribal field survey and oral history interviews consistent with applicable federal laws and regulations. The NRC staff has also repeatedly invited the Tribe to provide revisions to the protective order if it believes they are necessary. To date, however, the Tribe has not proposed modifications or provided comments on the NRC staff's proposed protective order amendments, which were sent to the Tribe's counsel on June 7, 2018.

The NRC staff maintains that the current protections in place are sufficient to protect the Tribe's sensitive and confidential information. And consistent with the Board's October 30, 2018, Order, a revision to the protective order is the appropriate mechanism by which the parties may address additional issues regarding sensitive unclassified non-safeguards information (SUNSI) and confidential information. The NRC staff will certainly consider the Tribe's input on the NRC staff's proposed amendment or on modifications the Tribe wishes to develop and share. The NRC staff, however, requests the Tribe's cooperation and consideration in providing timely input so that any motion to modify the protective order is filed with the Board prior to the site survey taking place. The staff will not file a motion to modify the protective order unless it receives feedback from the Tribe, and plans to move forward with negotiations with the existing protections in place.

Tribal Liaison Involvement

On December 12, 2018 (ADAMS ML18347A047), the NRC staff informed the Tribe that it was coordinating with the NRC's Federal, State, and Tribal Liaison Branch to seek a tribal liaison's involvement in future meetings. A NRC tribal liaison will be invited to upcoming meetings, as requested by the Tribe, and will facilitate negotiations on the site survey methodology. During these negotiations, the NRC staff will follow the guidance in the NRC's Tribal Policy Statement (January 9, 2017; 82 FR 2402), which established the principles the NRC staff will follow to promote effective government-to-government interactions with Indian and Alaska Native Tribes, and to encourage and facilitate tribal involvement in the areas over which the NRC has jurisdiction.

The Site Survey Report

Once the site survey has been completed, the contractor will document the findings of the survey based on the input provided by the participating Tribes, and will prepare a report that will be provided to the participating Tribes for review and comment. Input and comments submitted by the Tribe will be considered and included in the report. Sensitive information will be withheld and reported separately.

As summarized above, the NRC staff understands the scope of the resumed negotiations to be defined by the Board's October 30, 2018, Order. Many of the specific matters raised in the Tribe's January 11, 2019, response appear to fall outside of that scope or otherwise appear incompatible with the adjusted timelines underpinning the March 2018 Approach. However, in the interest of cooperation and further efficiency in the negotiations, the NRC staff offers the following responses.

Scope of the Dewey-Burdock Project

In its January 11, 2019, letter, the Tribe references a report, "NI 43-101 Technical Report Resource Estimate Dewey-Burdock Uranium ISR Project South Dakota, USA," published by Powertech on December 21, 2018, as the basis for its request for additional review of Powertech's project. The NRC staff has not received any notifications, letters of intent, or requests from Powertech to amend the license to expand its uranium recovery activities in South Dakota. Until the NRC staff receives a formal notification from the licensee of an intent to pursue a modification or expansion of its licensed activities, the referenced report does not warrant additional National Environmental Policy Act (NEPA) consideration in this proceeding. Further, any license amendments to expand the facility would require a separate NEPA review, which would be conducted after the licensee officially submits a license amendment request.

Scope of Work

The Tribe requested a copy of the scope of work describing the work to be conducted by the NRC staff's contractor. Tribe's Response at Page 1. The NRC staff has previously explained why the Tribe was legally precluded from involvement in the NRC staff's contract award process, and the NRC staff does not view its contract award as a subject for discussion during future negotiations on the survey methodology. However, for the Tribe's awareness, the NRC staff has enclosed the publicly available portions of the statement of work issued upon award of the contract (Enclosure 2). The document does not prescribe final details regarding the site survey methodology and elder interviews because, as the NRC staff has explained, the intention of the March 2018 Approach was to develop the site survey methodology with the input of the Tribes during the June 2018 webinars and teleconference calls (and now during the resumed negotiations).

NRC's Literature Review Report

On June 7, 2018, Dr. Nickens provided the literature review report to the invited Tribes (ADAMS ML18159A191 and ML18159A192). The report summarizes publicly available information in the open literature regarding historic, cultural, and religious resources of significance to the invited Tribes and focused on the Dewey-Burdock project area and its immediate region. The NRC staff was surprised by the Tribe's reaction in its January 11

letter, as this was the first time the NRC staff heard these concerns regarding the literature review report. It was never the NRC staff's intention to offend the Lakota, and for that the NRC staff apologizes. The NRC staff welcomes the Tribe's input to this literature review report, and, consistent with agency practice, will reference the Tribe's input in its NEPA supplemental analysis. Although the literature review report cannot revise what is already in existing literature, the NRC staff can incorporate the Tribe's specific objections.

Additional Funding

In its response, the Tribe requested to be granted NEPA cooperating agency status, receive "self-determination" grants, or execute cooperative agreements. Tribe's Response at Pages 4-5. These requests fall outside the scope of negotiations on the methodology, and also could not feasibly be achieved within the adjusted timeline of the March 2018 Approach. However, the staff would like to reiterate that in its letter dated December 5, 2018 (ADAMS ML18345A265), Powertech confirmed its willingness to provide reimbursement to the Tribe in the same amount as described in its letter to the NRC dated April 11, 2018, (ADAMS ML18101A223) to facilitate tribal participation. This reimbursement is consistent with reimbursement provided to Tribes during the 2013 tribal field survey and in other NRC projects, and the Tribe has previously agreed that such an amount would be appropriate (ADAMS ML18046A171).

In summary, although the Tribe's January 11, 2019, response addresses a number of issues that are outside the Board's stated scope of negotiations about a site survey methodology consistent with the March 2018 Approach, the NRC staff looks forward to productively continuing negotiations with the Tribe. As we are five weeks away from the March 1, 2019, milestone, and in an effort to conduct timely discussions and negotiations, the NRC would like to propose a teleconference meeting to introduce the NRC staff to the Tribe's new Tribal Historic Preservation Officer and discuss the framework for future negotiation meetings during the week of January 28, 2019 or the first week of February 2019. From there on, the NRC staff invites the Tribe to meet on a weekly basis to discuss and develop the site survey methodology. Weekly meetings would provide the appropriate time to discuss and develop the methodology as a group, but also provide reasonable time for each party to confer internally about the information developed.

Weekly meetings would also allow the parties to be prepared for the planned meeting of the Oglala Sioux Tribe Tribal Historic Preservation Advisory Council on February 22, 2019, in Rapid City, South Dakota, which the NRC staff anticipates attending in response to the Tribe's counsel's January 18, 2019, e-mail invitation (ADAMS ML19022A061). The NRC staff looks forward to a productive discussion at this meeting, but would like to emphasize that given the adjusted timeline of the March 2018 Approach, substantive discussions regarding a site survey methodology will also need to take place in advance of that meeting.

In accordance with Title 10 of the Code of Federal Regulations (CFR) 2.390, a copy of this letter will be available electronically for public inspection in the NRC Public Document Room or from the Publicly Available Records component of NRC's ADAMS. ADAMS is accessible from the NRC website at <http://www.nrc.gov/reading-rm/adams.html>.

If you have any questions or concerns, please contact Ms. Diana Diaz-Toro of my staff. Ms. Diaz-Toro can be reached at (301) 415-0930 or via e-mail at Diana.Diaz-Toro@nrc.gov.

Sincerely,

/RA/

Cinthya I. Román, Chief
Environmental Review Branch
Division of Fuel Cycle Safety, Safeguards,
and Environmental Review
Office of Nuclear Material Safety
and Safeguards

Docket No. 40-9075
License No. SUA-1600

Enclosures:

1. Spangler's Resume
2. SC&A Contract Statement of Work

cc:

Mr. Troy "Scott" Weston, President
Oglala Sioux Tribe
Mr. Jeff C. Parsons, Counsel
for the Oglala Sioux Tribe
Mr. Travis E. Stills, Counsel
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Mr. Steve Vance, Tribal Historic Preservation Office
Cheyenne River Sioux Tribe
Mr. Garrie Kills A Hundred, Tribal Historic Preservation Officer
Flandreau-Santee Sioux Tribe
Mr. Ben Rhodd, Tribal Historic Preservation Officer
Rosebud Sioux Tribe of Indians
Mr. Jon Eagle, Tribal Historic Preservation Officer
Standing Rock Sioux Tribe
Ms. Clair Green, Cultural Resources Office
Lower Brule Sioux Tribe
Mr. Kip Spotted Eagle, Director
Tribal Historic Preservation Office
Yankton Sioux Tribe
Mr. Merle Marks, Tribal Historic Preservation Office
Crow Creek Sioux Tribe

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DATED: January 25, 2019

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