



Protecting the Land, Cultural,
Heritage and Tradition for
the Future Generation

Tribal Historic Preservation Office

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October 19, 2012

Dear Mr. Hsueh,

The Rosebud Sioux Tribe THPO (RST-THPO) is in receipt of the Nuclear Regulatory Commissions' (NRC) letter dated October 12, 2012 regarding the Dewey-Burdock in-situ recovery project and the request to seek alternatives to field identification. We find this new request to be disappointing by the lead federal agency especially in light of other recent letters and emails to the tribes. In particular, with the following bullying by ultimatum tactics:

The NRC staff encourages the Tribal Representatives to consider the offer provided by the applicant when revising the SOW (which should include the above requested information). If Tribal Representatives are unable to provide the requested information by the end of the September 5th and 6th, 2012 meeting to support completion of a field survey in the fall of 2012, the NRC and BLM staff will develop an alternative approach for identifying historic properties, and will move the Section 106 process forward.

(quote from email sent to tribes by
Haimanot Yilma on Aug. 30/12).

That quote alone represents one of many fundamental misunderstandings of the Section 106 process by the NRC. The offer by the applicant in this quote included a sum of money which in no way would suffice for field identification for the 10,000 acres that this undertakings area of potential effect technically is. This paltry sum would not even be sufficient for the 2700-3700 acres of direct effects that the applicant and federal agency only want surveyed. The RST-THPO continues to maintain its position, supported by the law by the way, that only addressing the direct effects of a proposed undertaking does not fulfill a federal agencies responsibilities for section 106 considering that the area of potential effects for an undertaking are defined as both direct and indirect effects per 36CFR800.16 (d). The applicants' proposal, which is favored by the NRC, would place unrealistic expectations on our field crews that could never be met. Yet, here we are almost two months later, after having the tribes preferred contractor submit their cost estimate and we are in the exact same spot as we were in August. The NRC, by this letter, is yet again attempting to find an alternative to on the ground field identification. The only difference between the August email and the current letter is that the NRC is making a feeble attempt to include the tribes in their discussion to not conduct proper on the ground field identification.

The SRST-THPO whole-heartedly disagrees with this attempt to circumvent the 106 process on behalf of the applicants' and federal agencies timeline and budget. The following comments outline this disagreement.

The participating tribes have made a concerted and cooperative effort to work with the Nuclear Regulatory Commission on a proposal to address our concerns about the identification of historic properties of significance to tribes for this project. Meaningful conversation pertaining to proper field identification only began in February of 2012 at the meeting in Rapid City, SD, not June of 2011. Identification under Section 106 has, and continues to be, the tribe's primary concern.

The RST-THPO has participated in the Section 106 process up to this point steadfastly and in good faith despite the many missteps in the process by the lead federal agency and the intrusive participation by the applicant and their third party consultants. The latter, at many times during these discussions, are perceived to be running the entire process in place of the lead federal agency and this recent letter and previous letters and communications only re-inforces this perception.

36CFR800.2 (c) (2) (ii) specifies that:

Section 101 (d) (6) (b) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

36CFR800.2 (c) (2) (ii) (A) further specifies that:

The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertakings effects on such properties, and participate in the resolution of adverse effects.

These two sections of the act specify the tribes' role as consulting parties within the process and the federal agency requirements for consultation with the tribes for every undertaking. The participating tribes have repeatedly stated that we require in field identification for historic properties of significance to tribes for this and all projects. That has been our requirement for this project ever since the informal field visits and information gathering session of June 2011. The participating tribes advised the NRC that identification efforts conducted by archaeologists were insufficient to address historic properties of significance to tribes. The tribes proved that these efforts were insufficient by visiting sites identified by the archaeologists and identifying numerous features that were missed that are significant to tribes. The tribes, applicant, NRC staff and the archaeologists were all present when these historic properties of significance were observed.

Were the tribes given a reasonable opportunity to advise, consult and identify concerns pursuant to 36CFR800.2 (c) (2) (ii) (A)? Yes in some ways the tribes were. Unfortunately, it all amounts to a check box that must be checked in the process when everything that is told to them during these consultations is being subsequently ignored. All of the information which was gathered pursuant to 36CFR800.4 (a) is being subsequently ignored by this latest letter from the NRC to keep to federal and applicant timelines.

The federal agency has stated that they intend to issue their record of decision for any EIS by May of 2013. The draft EIS is expected to be submitted for comments prior to December of 2012. This is the impetus in denying the tribes the opportunity to conduct a proper 100% survey of the entire area of potential effects. The applicant has repeatedly stated that funds would only be available for survey work up to the fall of 2012. Our historic properties of significance which will be destroyed by this project are in essence being held hostage by this process and by the applicant and federal agency. The 106 process should not be conducted to keep to an applicants and/or federal agencies timeline.

As stated in 36CFR800.1 (a):

The section 106 process seeks to accommodate historic preservation concerns with the needs of federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

The goal of the 106 process is not to keep to an applicants or federal agencies arbitrary external timeline. The section 106 process does not have a timeline for identification and consultation. In fact, the only reference to timing contained within the document pertaining to this issue is that the federal agency must complete the section 106 process prior to any approval for expenditure of Federal funds or prior to any issuance of any license (36CFR800.1 (c)). If the federal agency has not completed the section 106 process they cannot issue any license or commit any funds to that undertaking. Yet, the NRC continues to insist that it must be done now to keep to their external timelines for their record of decision and the applicant continues to pressure the federal agency by stating that funds are only available for work to be conducted during the fall of 2012 to keep to their timelines. This further reinforces the perception that it is the applicant who is in fact “running the show” as it were. The NRC’s record of decision for an EIS should have no influence whatsoever on their completion of the 106 process. Yet, here we are as tribes reading ultimatum bullying tactics by a federal agency to ensure that an external arbitrary date is adhered to that has nothing whatsoever to do with the section 106 process. This is a classic example of what is considered to be not consultation in good faith.

36CFR800.4 (a) (3) specifies that the agency official shall:

Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties; and

36CFR800.4 (a) (4) specifies that the agency official shall:

Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to 800.3 (f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible to the National Register, recognizing that an Indian tribe or Native Hawaiian organization may be reluctant to divulge specific information regarding the location, nature and activities associated with such sites.

It has already been established through 36CFR800.2 (c) (2) (ii) that the tribes are to be considered consulting parties for this undertaking and as such the federal agency must gather and seek information

pertaining to historic properties from us and to identify issues relating to the undertakings potential effects on those historic properties. The tribe's primary concern with the effects of this undertaking to historic properties has been the insufficient identification efforts undertaken to identify historic properties of significance to tribes. In particular, if the project proceeds without field identification for our historic sites of significance; numerous sites will be impacted. The tribes have provided this information numerous times and even proven this statement in the field yet it is being ignored to stay true to an applicant's and federal agencies timeline. Our historic properties of significance should not be held hostage in this manner. It has been repeatedly stated over the past two months that the NRC will just move along with the project or that the applicant will not pay if field identification does not happen this fall. The October 12, 2012 letter also has the same bullying tactics through ultimatum contained within it by requesting a response by October 19th. If the tribes did not respond by October 19th, what were the NRC plans? Would they have just moved along with the BLM and applicant as they stated they would back in August, 2012? The RST-THPO believes they would have. This is not good faith consultation to continue to try and bully tribes into accepting a proposal that is insufficient to even begin field identification efforts in the form of a 100% survey.

36CFR800.4 (b) requires that an agency official shall:

Based on the information gathered under paragraph [a] (*outlined above-for clarification*) of this section, and in consultation with the SHPO/THPO and any Indian Tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, the agency official shall take the steps necessary to identify historic properties within the area of potential effects.

36CFR800.4 (b) (1) requires that the agency official shall:

The agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigations and field survey....

36CFR800.4 (b) (1) is precisely what the NRC is referring to when it states in the October 12, 2012 letter that:

The NRC recognizes that there are additional methods for identifying potential properties of traditional religious and cultural importance to tribes at the proposed Dewey-Burdock site. Alternatives include opening the site to interested tribal specialists over a period of several weeks with payments to be made to individual tribes, or seeking ethno-historical and ethnographic information from tribal specialists in interviews at tribal headquarters.

The NRC is neglecting the requirements of 36CFR800.4 (b) that the level of effort contained within 36CFR800.4 (b) (1) is based upon the information gathered pursuant to 36CFR800.4 (a) and is to be conducted in consultation with the SHPO/THPO and Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects. The RST-THPO will, once again, for the numerous time during these consultations, state that in field identification in the form of a 100% survey of the area of potential effects for historic properties of significance to tribes by tribal personnel from the participating tribes is required for this project. The current identification efforts have been proven to be insufficient at identifying historic properties of significance to tribes justifies our position.

It is not good faith consultation to flat out ignore what the tribes have been repeatedly stating for identification since June of 2011. The NRC is basically requesting alternatives to field identification due to an applicant's unwillingness to pay for a proper 100% survey of an undertakings area of potential effect for historic properties of significance to tribes. The applicant had no problem financially supporting other identification efforts such as the archaeologists during their Class III survey and subsequent intensive excavations at 20 sites. If the applicant is unwilling to financially support the tribes to conduct a proper survey for historic properties of significance to them; then the federal agency will not be able to complete the section 106 process and their request for a permit should be denied by the NRC. Our historic properties should not be held hostage in this process or irrevocably destroyed because an applicant is refusing to pay for a proper survey and a federal agency does not understand the section 106 process.

Alternatives include opening the site to interested tribal specialists over a period of several weeks with payments to be made to individual tribes, or seeking ethno-historical and ethnographic information from tribal specialists in interviews at tribal headquarters.

This statement completely ignores everything that has been discussed with the NRC by the participating tribes since June of 2011. The preferred contractor chosen by the tribes was chosen because his company could conduct a proper survey for sites of significance to tribes and could ensure that the proper protocols for these sites would be followed. What the NRC is suggesting does not accomplish that. Who would ensure that the proper protocols for these sites were respected under the NRC's proposal? Who would be recording these sites? Who would conduct the surveys and ensure that all areas within the area of potential effects received coverage? Who would download and process all this data? Who would write the reports that the SOW requires? Who would fill out the site forms required by the State Historic Preservation Office? Where would all of this information be stored? Looking at the NRC's proposal at face value, the NRC just wants the tribes to send a few people out to walk around for a while and see whatever they happen to see wherever the applicant decides to take them and that will somehow suffice? The NRC's recent proposal makes absolutely no sense and would be a complete disservice to our sites of significance if it ever gets accepted. Once again, and hopefully for the last time, the SRST-THPO requires on the ground field identification by tribal personnel from the participating tribes in the form of a 100% survey of the entire area of potential effects to address our concerns that the current level of identification does not take into account our historic properties of significance. We have proven that the current level of identification is insufficient by showing NRC staff sites of significance to tribes that were missed by current (archaeological) efforts.

The NRC's time should be invested in ensuring that proper identification efforts are conducted (100% survey of the entire area of potential effects by tribal personnel from the participating tribes) and in securing the funds necessary to ensure that the identification efforts are financially supported. It should not be wasted on efforts that do nothing to address tribal concerns with historic properties of significance that the NRC has themselves witnessed and knows will be destroyed by this proposed project. Until such time as the NRC can secure the funds from the applicant (and not the paltry sum that will not be sufficient as currently proposed by the applicant) to properly conduct a 100% survey of the entire area of potential effects for historic properties of significance to tribes; the section 106 process is not complete and therefore no license or approval for expenditure of federal funds can be given.

The request for ideas for alternative methods for identifying historic properties of significance to tribes in lieu of an actual 100% field survey of the entire area of potential effects is denied based on the reasons outlined in this letter.

The RST-THPO maintains that the only level of effort that is sufficient for this project is on the ground 100% survey of the entire area of potential effects by tribal personnel from the participating tribes. We have stated this since June 2011 and anything less would not address our concerns for identification per 36CFR800.4.

If the NRC wishes to pursue alternative methods during their level effort they are welcome to do so as a supplement to the 100% survey. However, this alternative method will never be agreed to by the RST-THPO as a replacement for a 100% field survey of the area of potential effects or as the sole level of effort per 36CFR800.4 (b) (1). The RST-THPO has stated repeatedly pursuant to the information gathered under 36CFR800.4 (a) that on the ground field identification of 100% of the area of potential effects by tribal members from the participating tribes is the minimum level of effort that must be conducted for this project.

The RST-THPO is willing and open to send Tribal Cultural Specialists and Monitors into the field to identify sites (2012) as we always have been. This assumes that our concerns with the project area of potential effects as defined by 36CFR800.16 (d) to account for both the direct and indirect effects, issues pertaining to confidentiality of the resources and any other additional concerns which may come up in the interim are addressed.

Sincerely,
Rosebud Sioux Tribe



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