

January 4, 2008

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
In-Situ Leach Facility, Crawford, Nebraska)	
)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

NRC STAFF'S RESPONSE TO PETITIONERS'
SUPPLEMENTAL AFFIDAVITS IN SUPPORT OF STANDING

Pursuant to the Board's December 20, 2007 Order, the NRC Staff ("Staff") submits this response to Petitioners' supplemental affidavits in support of standing. As explained below, the Staff objects to the affidavits of Debra White Plume and Thomas K. Cook because they exceed the scope of the Board's December 20, 2007 Order. Furthermore, the Staff objects to the affidavits submitted on behalf of Western Nebraska Resources Council (WNRC) and Slim Buttes Agricultural Development Corporation (SBADC) because they are insufficient to support representational standing for either organization.

BACKGROUND

On May 30, 2007, Crow Butte Resources (CBR or Applicant) requested an amendment to its existing operating license that would allow the development of a satellite in-situ leach (ISL) uranium recovery facility, the "North Trend Expansion Area" or "North Trend," near its existing ISL operation in Crawford, Nebraska.¹ On November 12, 2007, NRC received timely petitions from Debra White Plume, Thomas K. Cook, and three organizations: Owe Aku/Bring Back the

¹ Letter from Stephen P. Collings to Charles L. Miller dated May 30, 2007 (ADAMS ML0715500570).

Way (“Owe Aku”), (4) Slim Buttes Agricultural Development Corporation (SBADC), and (5) Western Nebraska Resources Council (WNRC).² On December 7, the NRC Staff filed a response to the petitions (“NRC Staff Response”), and on December 28, 2007, pursuant to the Board’s December 20, 2007 Order, two replies were filed: one on behalf of Thomas Cook, SBADC, and WNRC (“Cook Reply”), and the other on behalf of Debra White Plume and Owe Aku (“Owe Aku Reply”). Along with the replies, pursuant to the Board’s Order, affidavits were submitted by Thomas K. Cook and Joseph R. American Horse, Sr. on behalf of SBADC; by Janet Mize, Dr. Francis E. Anders, Beth Ranger, and Bruce McIntosh on behalf of WNRC; and by Debra White Plume on her own behalf.³

DISCUSSION

I. The Affidavits Submitted by Debra White Plume and Thomas Cook Exceed the Scope of the Board’s December 20 Order

The Staff objects to the affidavit of Debra White Plume and, to the extent that it attempts to advance his individual standing, the affidavit of Thomas Cook, because they exceed the scope of the Board’s Order, which was limited to supplemental affidavits in support of *representational* standing. In the teleconference on December 18, 2007, David Frankel, counsel for Thomas Cook, SBADC, and WNRC, asked the Board’s permission to submit affidavits to “provide the specific names and addresses that were asked for in the NRC’s response.” See Teleconference Transcript at 44-45. The Staff understood this request and the subsequent discussion of it to be limited to curing defects in representational standing by providing information about organizational members for whom information had not been

² Petitions from two other organizations, Chadron Native American Center and High Plains Community Development Corporation, were received but subsequently withdrawn from this proceeding.

³ The Staff notes that Owe Aku requested two additional weeks to provide affidavits in support of representational standing, and the Board has granted an extension until January 11, 2008.

provided in the original petition. See *id.* at 44-47 (indicating that this request was to provide “basic facts” in support a claim of representational standing for Western Nebraska Resources Council).⁴ For this reason, as discussed more fully below, the Staff objects to statements in the affidavits of Thomas Cook and Debra White Plume that were not in the original petition and that serve as further bases for their individual standing, whether in support of their individual petitions or the petitions of an organization.

A. Affidavit of Debra White Plume

Several statements in the affidavit of Debra White Plume improperly attempt to supplement her bases for individual standing and contentions provided in the original petition. In fact, her affidavit explicitly states that it is made “in support of my standing and contentions, to *supplement the Petition I filed in this matter.*” Affidavit of Debra White Plume at 1 (emphasis added). The Board should not permit Ms. White Plume to supplement the bases for her individual standing because she has been part of the proceeding from the start and thus had ample opportunity to provide such bases in her initial petition. Moreover, statements in her affidavit that raise issues different than those raised in the original petition are new contentions which are inadmissible unless they meet the requirements for new and untimely contentions. See 10 C.F.R. §§ 2.309(c) and (f)(2). For these reasons, Ms. White Plume’s statements concerning the Fort Laramie Treaty boundaries,⁵ the historical significance of the land to her

⁴ The Board’s subsequent Order allowed petitioners to submit additional affidavits in support of standing, but did not specifically indicate the limitations that were to apply. See December 20, 2007 Order at 2. However, the Order referred participants to two cases dealing with curing of defects in standing, *id.* at 5, suggesting that the affidavits were to be limited to curing defects and excluding submissions attempting to bolster existing assertions of standing.

⁵ The Staff notes that the Fort Laramie Treaties were not discussed in the original petitions, although they are discussed in both the Cook Reply and the Owe Aku Reply. With respect to this and other new issues, or new bases for contentions, that are raised in the replies or the affidavits, the Staff plans to file a motion to strike those portions of the documents that are outside the proper scope of a reply as described in (continued. . .)

and her family, the possible impact on her grandsons' ability to ride through the area each year in the Crazy Horse Memorial ride, her family's fishing in the White River, and her family's gathering of eagle feathers in the expansion area and possible interference with their religious practices should all be stricken and excluded from the Board's consideration. See Affidavit of Debra White Plume at 1-2.

Even if the Board were to consider these statements, however, they are insufficient to give Ms. White Plume individual standing in this proceeding. To the extent that Ms. White Plume's affidavit reiterates her claims of standing in the original petition based on injury from radon, contaminated groundwater, or decrease in property values at her residence, the Staff reasserts the arguments from its initial response. See NRC Staff Response at 6-9. With respect to Ms. White Plume's supplemental assertions, none of these are sufficient bases for standing. Although Ms. White Plume states that the area has historical significance to her based on the murder of Crazy Horse in "the relatively immediate area," and the escape of her ancestors from Fort Robinson, she provides no specific information on where these events occurred in relation to the proposed site. Such general references to locations are insufficient bases for standing. See *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426-27 (1997). Ms. White Plume's statements with respect to her grandsons and the Crazy Horse Memorial Ride cannot be used as a basis for her standing because a person cannot generally assert standing on behalf of another, *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989), and Ms. White Plume has not indicated that

(. . .continued)

Nuclear Management Services, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). Staff Counsel has already contacted Petitioners' attorneys to inform them of the possibility of the filing of this motion, and is in the process of discussing resolution of the issue with them.

her grandsons are minors or that they are otherwise unable to assert standing. Furthermore, even if Ms. White Plume could assert standing on her grandsons' behalf, a ride through the area once a year is an occasional use of the area that is insufficient to support standing. *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-21, 65 NRC 519, 523-24 (2007).

Ms. White Plume's assertions concerning her family fishing in the White River are insufficient grounds for standing because she does not specify at what location on the river she fishes and the frequency with which this activity occurs. Her affidavit implies that the fishing takes place on the Pine Ridge Reservation, which is at least 40 miles away from the proposed expansion site. Ms. White Plume does not provide a plausible basis for how this project will lead to contamination of the river or how she would be harmed at such a remote location.

Finally, Ms. White Plume asserts that her family gathers eagle feathers at the proposed expansion area and the expansion will scare eagles away, and thus, interfere with her religious practices. However, Ms. White Plume does not state how often she participates in this activity, nor does she explain why the proposed expansion would scare eagles away.

B. Affidavit of Thomas Cook

With respect to Thomas Cook's affidavit, the Staff objects to the statement in Paragraph 4 concerning increased difficulties for SBADC because of extreme drought conditions and drying of the White River. This statement is not related to Mr. Cook's individual standing and was not part of the original petition. Similarly, the Staff objects to the statements in Paragraphs 5 and 6 concerning Mr. Cook's participation in the "sweat lodge" ceremony. Mr. Cook had the opportunity to raise these issues in support of his individual standing when he submitted his original petition. Also, these statements raise the issue of interference with religious practices, which was not a contention in the original petition.

Even if the Board considers these portions of Mr. Cook's affidavit, they are insufficient to grant him standing in this proceeding. The additional facts in Mr. Cook's affidavit that relate to

his individual standing are those concerning the sweat lodge ceremony, which he participates in at Slim Buttes, approximately 40 miles⁶ away from the proposed expansion site. See Cook Affidavit at 1. In support of its objections, the Staff reasserts the arguments made in its initial response with respect to Mr. Cook's standing. See NRC Staff Response at 9-11.

II. The Affidavits Provided in Support of WNRC and SBADC Contain Defects and are Insufficient to Support Representational Standing

To obtain representational standing, an organization must “demonstrate how at least one member may be affected by the licensing action, must identify that member by name/address, and must show that the organization is authorized to request a hearing on that member’s behalf.” *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 37, 47 (2002). The organization must show that the member has individual standing in order to assert representational standing on his behalf, and “the interests that the representative organization seeks to protect must be germane to its own purpose.” *Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409 (2007).

In support of representational standing, WNRC provided affidavits from four individuals: Janet Mize, Beth Ranger, Dr. Francis Anders, and Bruce McIntosh. SBADC provided affidavits from Joseph R. American Horse, Sr. and Thomas Cook.⁷ As explained below, the Staff objects to statements in several of these affidavits because they lack necessary information or they are unrelated to individual standing. In addition, none of these affidavits are sufficient to support

⁶ This distance was calculated using the distance calculator at <http://infoplease.com/atlas/calculate-distance.html>.

⁷ The sufficiency of Thomas Cook's affidavit in support of his individual standing, and thus in support of representational standing by SBADC, is discussed in Section I above.

individual standing of the affiants, and as a result the affidavits do not support representational standing for either SBADC or WNRC. Each affidavit is discussed in turn below.

A. Affidavit of Bruce McIntosh (WNRC)

In support of his standing, Mr. McIntosh's affidavit states that his address is "POB 612, Chadron, NE 69337," and that he uses the water from his well for drinking and bathing. McIntosh Affidavit at 1. These statements are insufficient to support his individual standing in this proceeding. First, a post office box is not sufficiently specific address information to ascertain the location of his property and its distance from the proposed North Trend expansion; either a street address or other specific location information is needed. See *International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 6-7 (1997). However, assuming that Mr. McIntosh lives in Chadron, Nebraska, his property is approximately 20 miles from the proposed expansion site. See Cook Affidavit at 1 (stating that his property in Chadron is approximately 20 miles from Crow Butte). For the same reasons stated in the Staff's initial response for Ms. White Plume and Mr. Cook, Mr. McIntosh lacks standing. See NRC Staff Response at 6-11.

In addition, the Staff objects to paragraphs 6 and 7 in Mr. McIntosh's affidavit because they do not relate to standing but are attempts to supplement the factual bases for petitioners' contentions. Paragraph 6 discusses geologic mapping and lithostratigraphy, citing a paper by Lagarry et al. that was not mentioned in the original petition. Paragraph 7 discusses the recent drying up of Squaw Creek, noting that it has only become dry in "the last 3 or 4 years," but does not indicate that this creek runs through Mr. McIntosh's property or is used by Mr. McIntosh. The original petition contained no discussion of the conditions in Squaw Creek; therefore, this statement is inappropriate. These two paragraphs and the paper cited in paragraph 6 should not be considered by the Board.

B. Affidavit of Janet Mize (WNRC)

In support of her standing, Janet Mize states that her address is “POB 1295, Chadron, NE 69337” and that she also owns land in Crawford, Nebraska, “about four (4) miles South East of Crow Buttes [sic] Resources’ uranium mining operation.” Ms. Mize also asserts that she “currently use[s] this property recreationally for camping and water play using the stream that comes from springs on the property” and that she plans on building a home on the property and living there when she retires. Mize Affidavit at 1. These statements are insufficient to grant individual standing for several reasons. First, the affidavit submitted by Janet Mize in support of representational standing for WNRC is defective because it does not indicate that she is a member of WNRC or when she became a member. One of the basic prerequisites for representational standing is that the person on whom such standing is based must be a member of the organization. See *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 37, 47 (2000) (the organization “[m]ust demonstrate how at least one *member* may be affected by the licensing action”) (emphasis added). Thus, an affidavit in support of representational standing must state that the person is a member of the organization.

Moreover, in cases such as this one, where affidavits are being submitted after the original petition and responsive pleadings have been filed, the affidavit should also indicate when the person became a member. This information is necessary to prevent “an organization whose membership is far removed from the facility and who claimed to have membership in the vicinity ... to later try to recruit individuals in the vicinity as members and gain a retroactive recognition of interest.” *Washington Public Power Supply System* (WPPSS Nuclear Project No. 2), LBP-79-7, 9 N.R.C. 330, 336 (1979) (“WPPSS”). In WPPSS, the Board rejected an assertion of representation standing based on affidavits from two individuals when the

individuals had joined the organization only upon completing their affidavits two months after the petition was originally filed. *Id.*

Ms. Mize's affidavit is also defective because, as discussed above for Mr. McIntosh, a post office box is insufficient location information. Assuming, however, that Ms. Mize's current residence in Chadron, Nebraska, is 20 miles from the proposed site, Ms. Mize lacks standing based on her current residence for the same reasons stated in the Staff's initial response for Ms. White Plume and Mr. Cook. See NRC Staff Response at 6-11.

Ms. Mize also cannot be granted standing based on her property in Crawford. Although Ms. Mize states that she owns property 4 miles southeast of Crow Butte's mining operation, she does not provide a street address and fails to indicate whether this distance is 4 miles from the existing operation or the proposed site. Furthermore, Ms. Mize has not indicated whether her property is upstream or downstream from the proposed North Trend site. Therefore, it is only speculation that the proposed expansion would affect the water on her property. In addition, Ms. Mize fails to indicate how often she currently uses the property for recreation. Mere occasional use is not sufficient grounds for standing. *Consumers Energy Co.* (Big Rock Point ISFSI), CLI-07-21, 65 NRC 519, 523-24 (2007). Also, Ms. Mize does not indicate when she plans to build a home and retire on this property, so her permanent occupancy is merely speculative at this point.

Although Ms. Mize does not assert injury from airborne radon, WNRC asserted it as a basis for standing in their original petition. See Reference Petition at 7. Even if Ms. Mize did make such an assertion, however, it would not suffice to grant representational standing to WNRC. Protection of members from exposure to radon is not within WNRC's organizational mission, which is to protect and preserve natural resources, especially groundwater. See, e.g., McIntosh Affidavit at 1. Thus, asserted harm from radon could not be used for representational

standing. *Palisades*, CLI-07-18, 65 NRC at 409; *see also Curators of the University of Missouri*, LBP-90-18, 31 NRC 559, 565-66 (1990).

C. Affidavit of Beth Ranger (WNRC)

In support of her standing, Ms. Ranger states that she lives at 704 Annin St., Crawford, Nebraska, and that she and her family use city water for drinking, bathing, and irrigation for gardening. Ranger Affidavit at 1. For the reasons discussed above, Ms. Ranger's affidavit is defective because it does not indicate whether or not she is a member of WNRC and how long she has been a member. Moreover, Ms. Ranger's affidavit is insufficient to grant standing. Although Ms. Ranger lives approximately 3 miles from the proposed site, she gets her water from the city of Crawford, not a well. Ms. Ranger's affidavit does not indicate a basis for concluding that the amendment in question impacts her water supply or otherwise impacts her.

Ms. Ranger does not assert injury from airborne radon; however, as noted above, WNRC asserted such an injury in its original petition. As discussed above for Ms. Mize, even if Ms. Ranger did make such an assertion, it would not suffice to grant representational standing to WNRC. *Palisades*, CLI-07-18, 65 NRC at 409; *see also Curators of the University of Missouri*, LBP-90-18, 31 NRC 559, 565-66 (1990).

D. Affidavit of Dr. Francis Anders (WNRC)

In support of his standing, Dr. Francis Anders states that he lives and works in Crawford, Nebraska at 22-24 West Ash Creek Road. Anders Affidavit at 1. He further states that he uses the water from a well on his property for "drinking, bathing, irrigation, and stock water," and that he has observed bad odors and discoloration in his well water and sand in his water filter and toilet since CBR began drilling approximately a mile from his home in Fall, 2007. *Id.* The Staff objects to Dr. Anders' statements concerning his well water because these statements address Crow Butte's existing operation, not the proposed expansion. Issues involving the existing operation are not within the scope of this license amendment proceeding. Also, Dr. Anders

does not assert injury from exposure to radon, although as noted above, WNRC did so in its original petition. As discussed above for Ms. Mize, even if Dr. Anders did assert such an injury, alleged harm from radon could not be used for representational standing on WNRC's behalf.

E. Joseph American Horse (SBADC)

In support of his standing, Joseph American Horse states that his address is "POB 941, Pine Ridge, SD 57770," and that he participates in the "sweat lodge ceremony at Slim Buttes which uses water from a well located at Slim Buttes. American Horse Affidavit at 1. Mr. American Horse also makes several other statements in his affidavit related to the work of SBADC and the water rights of the Oglala Sioux Tribe under the treaties of 1851 and 1868. *Id.* Paragraph 4, which describes the investments SBADC has made in developing family and community gardens, is not a statement pertaining to Mr. American Horse's individual standing and is thus inappropriate for the purpose of supporting representational standing of SBADC. Paragraphs 5 and 6, which relate to sacred ceremonies that Mr. American Horse participates in, cannot be used to support representational standing because the alleged injuries that would occur are not within the purpose of SBADC, whose mission is to develop agricultural resources on the Pine Ridge Reservation. *See Palisades*, CLI-07-18, 65 NRC at 409; *Curators*, LBP-90-18, 31 NRC at 565-66. Finally, Paragraph 7 asserts that the Oglala Sioux Tribe "possesses superior water rights in the region ... arising from federal treaties with the Great Sioux Nation in 1851 and 1868." This assertion is an attempt to introduce an additional basis for petitioners' contentions that was not present in the original petition.

As stated above for Mr. McIntosh, Mr. American Horse's affidavit is defective because it provides only a post office box as an address. Assuming, however, that Mr. American Horse lives in Pine Ridge, South Dakota, which is approximately 49.5 miles from Crawford, Nebraska, he still has not provided sufficient bases for granting standing. Like Mr. Cook, Mr. American Horse states that he participates in a religious ceremony using water at Slim Buttes, which is 40

miles from the proposed North Trend site. Thus, for the same reasons asserted in the Staff's initial response for Ms. White Plume and Mr. Cook, Mr. American Horse lacks standing. See NRC Staff Response at 6-11.

CONCLUSION

For the foregoing reasons, neither WNRC nor SBADC can obtain representational standing based on the affidavits submitted on December 28.

Respectfully submitted,

/RA by Marcia J. Simon/

Marcia J. Simon
Andrea' Z. Jones
Counsel for NRC Staff

Signed at Rockville, Maryland
This 4th day of January, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITIONERS' SUPPLEMENTAL AFFIDAVITS IN SUPPORT OF STANDING" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 4th day of January, 2008:

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