

**RAS 14952**

**Official Transcript of Proceedings**  
**NUCLEAR REGULATORY COMMISSION**

Title: Crow Butte Resources, Inc.  
(In Situ Leach Facility)

Docket Number: 40-8943-MLA

DOCKETED  
USNRC

January 25, 2008 (9:46am)

Location: Teleconference

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Date: Wednesday, January 23, 2008

Work Order No.: NRC-1987

Pages 375-414

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

3 + + + + +

4 ATOMIC SAFETY AND LICENSING BOARD PANEL

5 + + + + +

6 -----:  
7 IN THE MATTER OF: :

8 CROW BUTTE RESOURCES, INC. : Docket No.

9 : 40-8943

10 (In Situ Leach Facility) :

11 -----:

12  
13 Wednesday, January 23, 2008

14 Teleconference

15  
16 The above entitled matter convened,  
17 pursuant to notice, at 3:00 p.m.

18  
19  
20 BEFORE:

21 ANN MARSHALL YOUNG, Chair, Administrative Judge

22 RICHARD E. COLE, Administrative Judge

23 FRED W. OLIVER, Administrative Judge  
24  
25

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20  
21 Also Present:

22 JACOB FROHMAN

23 RICHARD KATSENBURG

24 LARRY TEAHON

25 JOHANNA THIBAUT

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P-R-O-C-E-E-D-I-N-G-S

3:07 p.m.

JUDGE YOUNG: All right, this is Judge Young. Welcome everyone. I think we've all identified ourselves to the Court Reporter and if you'll do it like the last Court Reporter did, you'll list all those present. I'm talking to the Court Reporter now. Do we need to have everyone identify themselves again?

THE REPORTER: I have the list. I have the list made already of everyone who's present, so it's up to you whether you want them to identify themselves on the record but I already know who's present.

JUDGE YOUNG: Okay, well, just let's go through it one more time.

THE REPORTER: Okay.

JUDGE YOUNG: This is Judge Young. And maybe have each person say their own names so that it will be easier to identify voices.

JUDGE COLE: Yeah, this is Judge Richard Cole, C-o-l-e.

JUDGE OLIVER: This is Fred Oliver.

JUDGE YOUNG: Going to the staff next.

MS. JONES: Andrea Jones, for the NRC

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1 staff.

2 MS. SIMON: This is Marcia Simon, also for  
3 the NRC staff.

4 MR. COHEN: This is Stephen Cohen, Project  
5 Manager for Crow Butte, NRC staff.

6 JUDGE YOUNG: This is Judge Young. Did  
7 the staff have anyone else? I can't recall?

8 MS. JONES: No, Judge, that's it.

9 JUDGE YOUNG: Okay, moving to the  
10 Applicant.

11 MR. SMITH: This is Tyson Smith for Crow  
12 Butte Resources.

13 MR. MCGUIRE: This is Mark McGuire for  
14 Crow Butte Resources.

15 MR. TEAHON: Larry Teahon, Crow Butte  
16 Resources.

17 JUDGE YOUNG: And then for the  
18 Petitioners?

19 MR. FROHMAN: This is Jake Frohman for the  
20 Petitioners.

21 MR. ELLISON: Bruce Ellison for  
22 Petitioners Debra White Plume and Owe Aku.

23 MR. FRANKEL: And David Frankel for Tom  
24 Cook, Western Nebraska Resources Council and Slim  
25 Buttes Agricultural Development Corporation.

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1 JUDGE YOUNG: This is Judge Young again.  
2 Mr. Frohman, I'm not sure -- what's your actual role  
3 with regard to the Petitioners and Mr. Ellison and Mr.  
4 Frankel, you can also help clarify. I thought you  
5 were more or less just observing or --

6 MR. FRANKEL: Mr. Frohman is assisting in  
7 note-taking and in helping with some research. He's  
8 not an attorney of record, your Honor, but he's  
9 serving more in a paralegal capacity for us.

10 MR. FROHMAN: That's correct.

11 THE REPORTER: This is the Court Reporter,  
12 I'm sorry, who's speaking?

13 MR. FRANKEL: That was David Frankel, I  
14 apologize, David Frankel.

15 THE REPORTER: Thank you.

16 JUDGE YOUNG: Okay, thank you. All right,  
17 if everyone -- this is Judge Young again. If everyone  
18 has received our notice of today, we've listed the  
19 items to address that we -- that I found that we  
20 needed to address. After the issuance of that, there  
21 were a couple of other things that came up. One was  
22 I'm not sure I mentioned in there whether the parties  
23 wanted to provide any additional briefing on the  
24 terrorism cases. So that can be a possible number 8.

25 And then also, pardon me, we didn't know

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1 whether the petitioners had any plans to file an  
2 amended contention. We didn't list that as a separate  
3 item. Mr. Ellison or Mr. Frankel, do you have any  
4 intention to file an actual amended contention or --  
5 well, do you have any intention to do that?

6 MR. FRANKEL: This is David Frankel. Your  
7 Honor, that's not something that we've had a chance to  
8 confer on.

9 JUDGE YOUNG: We're having a hard time  
10 hearing you here.

11 MR. FRANKEL: (Inaudible).

12 JUDGE YOUNG: I still didn't understand.  
13 Are you on a speaker phone maybe?

14 MR. ELLISON: Your Honor, this is Bruce  
15 Ellison. I believe that --

16 MR. FRANKEL: I'm trying to get the best  
17 place to stand. I'm on a mobile phone. Can you hear  
18 me now, your Honor?

19 JUDGE YOUNG: Yes, that's good.

20 MR. FRANKEL: Okay, I was saying that Mr.  
21 Ellison and I have not had a chance to confer with our  
22 clients on that. We definitely observed the manner in  
23 which the Judge reframed some of our contentions and  
24 if it would be helpful, we can file amended  
25 contentions but we just haven't had a chance to talk

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1 about that, your Honor.

2 JUDGE YOUNG: Well, the reason I raised it  
3 was because after I drew up this list, I think I saw  
4 a reference to it, but the reason for numbers 1 and 2  
5 on the list were to address the submission of Exhibits  
6 A and B. So that Exhibits A and B would be in the  
7 nature of an amendment to the support for the first  
8 and second contentions, I guess, and also to the  
9 extent that they were raised for standing.

10 On the contention issue, as you recall, we  
11 had some discussion about whether the submission of  
12 those would need to meet the requirements of 10 CFR  
13 Section 2.309(f)(2) or also Section 2.309(c). So I  
14 was not actually trying to suggest that you do file an  
15 amended contention but I think the way we were looking  
16 at it was the submission of Exhibits A and B were in  
17 the nature of an amendment to Contentions 1 and 2.

18 So unless you indicate that you do want to  
19 file an amended contention in addition to that, which  
20 would bring up a whole other set of issues depending  
21 upon what that was, I guess we would just go into  
22 setting deadlines for the things listed, but if anyone  
23 wants to file anything on the terrorism issue --

24 MR. ELLISON: Judge Young, if I may, this  
25 is Bruce Ellison.

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1 JUDGE YOUNG: Okay.

2 MR. ELLISON: If we would be able to have  
3 a week for Mr. Frankel, Mr. Frohman and I to confer  
4 with our clients regarding any possible amended  
5 contentions, that would be appreciated.

6 JUDGE YOUNG: Do you see any need to --  
7 well, I guess we could do that and then also go ahead  
8 and set deadlines for the things that we have here.

9 MR. ELLISON: Yes, ma'am.

10 JUDGE YOUNG: Okay.

11 MR. ELLISON: But if we could at least  
12 have an opportunity to talk about this specific issue  
13 and certainly we have other things we already know  
14 about.

15 JUDGE YOUNG: So you would notify us and  
16 all parties within a week whether you intend to file  
17 any amended contentions.

18 MR. ELLISON: Right. Does that sound like  
19 enough time, Dave and Jake?

20 MR. FRANKEL: Yes, David Frankel, yes.

21 MR. ELLISON: Okay, please.

22 JUDGE YOUNG: Okay. I'm going to -- this  
23 is Judge Young again. When there are pauses, it's  
24 just when I'm writing notes to myself. All right,  
25 then let me just ask all parties, does the list in

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1 today's notice include everything with the addition of  
2 the terrorism cases, any briefing on that, that anyone  
3 wanted to provide or are there any other things that  
4 we need to add to the list or delete from the list for  
5 that matter?

6 MS. JONES: Judge, this is Andrea Jones  
7 for the NRC staff. I did have a question about Number  
8 7 and when you said omitting from the list, I was kind  
9 of curious about the Nuclear Non-proliferation Treaty,  
10 the IAEA.

11 JUDGE YOUNG: The way I came up with this  
12 list was I just read through the transcript quickly  
13 and there was one place in the transcript, I can try  
14 to find it, where Mr. Smith indicated that he could  
15 provide the citation.

16 MR. SMITH: And this is Tyson Smith. I  
17 have those citations with me today. I'm happy to  
18 provide those whenever we get to that -- to Number 7.

19 MS. JONES: Okay.

20 JUDGE YOUNG: Okay, so that was actually  
21 one that was one of the quicker ones.

22 MS. JONES: Okay.

23 JUDGE YOUNG: There were several things  
24 where people said, "Well, I can provide this or that",  
25 and so that was one of those. Anything else that we

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1 need to add or take off the list?

2 Okay, well, it looks like there are  
3 basically two categories or maybe three. One and two  
4 are one category, and those are the ones relating to  
5 Exhibits A and B. Did we just get someone new on the  
6 call? Did we lose someone? Well, we'll go on. This  
7 is still Judge Young.

8 We just -- as we discussed last week, the  
9 NRC staff and the Applicant have the right to file  
10 responses to the substance of the Exhibits A and B and  
11 in addition to address the issue of whether and the  
12 extent to which the filing of the exhibits meets the  
13 requirements of 10 CFR, Section 2.309(f)(2) and/or  
14 Subsection (c) and also address which ones of those  
15 sections are applicable and to the extent you wish,  
16 also to address the issue of the relevance of the  
17 exhibits and the filing times on the outstanding.

18 And then there would be time for the  
19 Petitioners to file replies to the staff and  
20 Applicant's responses which would be -- the responses  
21 would be in the nature of responses to the proposed  
22 amendment to the contention found in Exhibits A and B  
23 and insofar as they were offered to provide additional  
24 support for Contentions A and B and then replies on  
25 those. That would be one category.

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1 I've noticed some beeping going on. Is  
2 there anyone --

3 MR. FRANKEL: This is David Frankel, your  
4 Honor. I dropped off the call and called back from a  
5 different phone. So, I apologize.

6 JUDGE YOUNG: I'm glad you said that. I  
7 was afraid we might be losing people or something like  
8 that. The second category of items would be items  
9 where there would be actual briefs, the main one being  
10 the treaty, treaty law and the UN declaration.

11 Then 5 and 6 are also briefing issues.  
12 Then the next category would be the Petitioner's  
13 supplemental statements from the members of WNRC. Did  
14 that include all the -- I think that was the only  
15 organization for which the staff asked for  
16 supplemental statements. Am I right?

17 MR. FRANKEL: This is David Frankel. I  
18 believe that's right, your Honor. Yes.

19 JUDGE YOUNG: Okay, and the staff agrees  
20 with that, too. I think Ms. Simon was the one who  
21 raised that. You agree with that?

22 MS. SIMON: Yes, your Honor, this is  
23 Marcia Simon.

24 JUDGE YOUNG: Okay. And then the  
25 citations which Mr. Smith says he can provide right

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1 away. So shall we propose dates or do any of you have  
2 specific proposals on the dates for any of these?

3 MR. FRANKEL: Your Honor, this is David  
4 Frankel. On the brief concerning the treaties and the  
5 indigenous issues, we -- the rights to consultation  
6 and the other tribal law and Indian law issues, we're  
7 going to need some time, more time on that than on  
8 some of the others just because it's such a broad area  
9 and we want to be clear on making sure that we at  
10 least mention the various items that came up during  
11 the hearing.

12 There were several and as your Honor  
13 noted. So I think we would need at least four weeks  
14 to do that one.

15 JUDGE YOUNG: This is Judge Young, we just  
16 lost you for a minute when there was another beeping.  
17 Did someone else join us?

18 MR. KATSENBERG: Yes, I just joined.  
19 Richard Katsenberg.

20 JUDGE YOUNG: Okay, and are you with any  
21 of the parties or just listening?

22 MR. KATSENBERG: Listening in.

23 JUDGE YOUNG: Okay. On the briefs, I  
24 guess -- this is Judge Young again. I would suggest  
25 that we have simultaneously filing of briefs by all

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1 parties and then another date for all parties to reply  
2 to the briefs of the other parties. And so that would  
3 apply to Number 3, Number -- I'm sorry, Number 3,  
4 Number 5, Number 6 and then if the parties want to,  
5 the terrorism issues.

6 Let me just ask, does any participant or  
7 do any participants want to brief the terrorism issues  
8 any further? I'm hearing no response. Can I assume  
9 that that means no party wants to brief the terrorism  
10 issue any further?

11 MS. JONES: Judge, this is Andrea Jones  
12 for the staff. At this point in time, I think we're  
13 okay on our end.

14 MR. SMITH: This is Tyson Smith for Crow  
15 Butte. We don't believe any additional briefing is  
16 necessary on the terrorism issue.

17 JUDGE YOUNG: And the Petitioners agree?

18 MR. FRANKEL: This is David Frankel for  
19 the three Petitioners I represent. We don't feel any  
20 additional briefing on the terrorism --

21 JUDGE YOUNG: Okay, we can cross that one  
22 off. It never was on in the first place anyway.  
23 Okay, so for Numbers 5 and 6, do the -- do the  
24 participants -- those seem like they would not take  
25 quite as long as the treaty and indigenous rights

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1 issues. Do I hear any disagreement with that?

2 MR. SMITH: Your Honor, this is Tyson  
3 Smith for Crow Butte. I guess we're not. We're a  
4 little unclear about how -- you know, in what context  
5 these issues are raised. We're not sure that they're  
6 really -- you know, there were no complaints regarding  
7 -- from any of the parties regarding notice. There's  
8 no contentions that really relate to this issue, nor  
9 to the license transfer issue and to the extent that  
10 was an issue from you know, some years ago, that's a  
11 question of enforcement rather than an issue regarding  
12 this license amendment.

13 So I think in our view, we're -- while  
14 we're happy to brief it, I think you know, I've got a  
15 couple of citations here where the Commission made  
16 clear that a notice isn't required for materials  
17 licensing actions. Perhaps we can dispense with that  
18 today.

19 JUDGE YOUNG: That would be fine. If no  
20 one wants to brief any given issue, then we're not  
21 going to force you to.

22 MR. FRANKEL: Your Honor, this is David  
23 Frankel for the Petitioners. We would object to that  
24 on a couple of grounds. The company, obviously, is  
25 not aware of the consultation responsibilities that it

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1 has and we have -- we're gathering the information  
2 from Mr. Harvey Whitewoman, who has confirmed that he  
3 was an administrative assistant to an individual named  
4 Johnson Holy Rock, who had no authority to bind the  
5 tribe and that contrary to Mr. Smith's assertions at  
6 the hearing, in fact, there was no resolution at the  
7 tribal level and so we --

8 JUDGE YOUNG: Excuse me, Mr. Frankel, let  
9 me interrupt you for a second. This is Judge Young.  
10 Which number on the list are you addressing right now?

11 MR. FRANKEL: I'm referring to the need to  
12 brief the indigenous rights issue.

13 JUDGE YOUNG: No, no, that was not -- I  
14 was not suggesting that that one not be briefed. That  
15 one, I think, we do think needs to be briefed. I was  
16 talking --

17 MR. FRANKEL: The license transfer issue?

18 JUDGE YOUNG: The license transfer issue  
19 and the license amendment issue. I think Mr. Smith  
20 said that he could provide some citations. Let me --

21 MR. FRANKEL: I believe Mr. Smith gave a  
22 legal opinion at the hearing that no public hearing or  
23 filings were required to transfer an NRC materials  
24 license. We find that hard to believe, so we'd be  
25 interested in seeing Mr. Smith's citations in writing.

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1 MS. JONES: Judge, this is Andrea Jones  
2 for the staff. I have to -- I sort of have to concur  
3 with Mr. Smith. This was not -- again, it was really  
4 not an issue that was raised by the Petitioners and so  
5 I don't understand why Mr. Frankel would be  
6 complaining about it at this stage in the game.

7 I just -- I'm not really sure that it's  
8 really relevant to the issues that they are raising.

9 JUDGE YOUNG: Let me back up for a minute.  
10 Let me just back up and again, the way this list was  
11 arrived at was going through the transcript, so what  
12 I can do is go to the places in the transcript where  
13 these issues arose. The supplemental statements, I  
14 think, Ms. Simon requested those. The -- let's see.

15 MR. FRANKEL: This came up in the context,  
16 your Honor, of our contention concerning the foreign  
17 ownership of Cameco and we made specific reference in  
18 the corrected petition to --

19 THE REPORTER: Is this Mr. Frankel?

20 MR. FRANKEL: -- the ownership of the  
21 project not being stated accurately.

22 THE REPORTER: Excuse me. Is this Mr.  
23 Frankel?

24 MR. FRANKEL: Yes.

25 THE REPORTER: Thank you.

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1 JUDGE YOUNG: Okay, let me -- just give me  
2 time to go through -- I have tabs on the pages of the  
3 transcript and I can -- let's -- before we get into  
4 any argument on this, and I'm not --

5 DR. SACHS: Yes, ma'am.

6 JUDGE YOUNG: On the rule on whether an  
7 amendment to a materials license requires notice of  
8 opportunity for hearing, I asked Ms. Simon if she  
9 could provide that and she said that she would. So  
10 and then I think later -- that was on page 17 -- I'm  
11 sorry 130 and 131 of the transcript and I think there  
12 was also a reference on page 173.

13 Then let's see.

14 (Pause)

15 JUDGE YOUNG: On the license transfer, on  
16 page 348 of the transcript I asked the staff, I said,  
17 "With the reactors there's a license transfer, if  
18 there is a license transfer, there's opportunity for  
19 a hearing" and referred back to the fact that you had  
20 agreed to give it some authority on the right to a  
21 hearing with the license amendment for a materials  
22 license and I think the staff said that they would  
23 provide the same thing with regard to the license  
24 transfer.

25 And then right after that was when Mr.

1 Smith agreed to provide the citations about being  
2 permitted to provide -- to supply uranium only to  
3 countries that have signed a nuclear non-proliferation  
4 treaty and are subject to the International Atomic  
5 Energy Agency. So those are more citations. So I  
6 probably should not have said briefs on Number 5.

7 And the staff -- maybe we could just say,  
8 "The staff could provide the citations for Number 5  
9 and Mr. Smith could provide the citations on Number 7.  
10 And it might be best if you do those just in writing  
11 and we can set a short deadline for that. Sometimes  
12 in transcripts, no offense to the Court Reporter, but  
13 we don't always get the exact citation form right, so  
14 it might be good to file those in writing.

15 On the status of NUREGs as being in the  
16 nature of law, guidance and/or fact, that's something  
17 that I think if the parties want to file briefs, you  
18 can file briefs but I don't think we're going to  
19 require you to file briefs. And Mr. Frankel, in view  
20 of what I've just said, are you arguing that you want  
21 more than what I've just listed?

22 MR. FRANKEL: Yes, your Honor. David  
23 Frankel here. My recollection of the hearing was that  
24 we expressly stated a dispute with the company, that  
25 it should have disclosed its ownership, that that

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1       seemed to be -- that the statements concerning the  
2       ownership concealed the foreign ownership by Cameco,  
3       Inc., and from my research it indicates that Cameco  
4       acquired this control in sometime between 1998 and  
5       1999. And it seems that, according to the company's  
6       view, an NRC materials license would be available to  
7       the highest bidder because no public notice is  
8       required. We find that -- we hold that in dispute  
9       And --

10               JUDGE YOUNG: Mr. Frankel, let me just ask  
11       you, what is it that you're asking for with regard to  
12       that?

13               MR. FRANKEL: I would like to see in  
14       writing the company's legal position that justifies,  
15       and the staff's legal position that justifies the  
16       transfer of a nuclear material license without any  
17       public hearing or comments.

18               JUDGE YOUNG: That, I think, the staff was  
19       going to provide to us.

20               MR. ELLISON: And could we then get a  
21       change to review it, your Honor, this is Bruce  
22       Ellison, and to then file a response should we choose  
23       to do that. We can also, as part of our filing of any  
24       amended contentions, rephrase our contentions in order  
25       to improve this as well. It was something that did

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1       come up.

2               MR. SMITH: Your Honor, this is Tyson  
3       Smith. I mean, this issue of a license transfer which  
4       if it was necessary at all would have taken place  
5       eight years ago, it's unrelated in any way, shape or  
6       form to the current license amendment for North Trend  
7       Expansion Area and it's clearly outside the scope of  
8       this proceeding. We don't see any need for briefing  
9       or an opportunity for response on this. You know,  
10      there's no basis for a contention, no genuine dispute  
11      in law or fact about this. Simply disputing an issue  
12      doesn't make an admissible contention.

13             JUDGE YOUNG: Okay.

14             MS. JONES: Judge, this is Andrea Jones  
15      for the NRC staff. The Petitioners never -- they  
16      never cited any particular regulatory requirement, any  
17      particular statutory requirement for this and again,  
18      this is for a license -- the issue of a license  
19      transfer, as I recall, this was just a question that  
20      your Honor was asking but I don't recall that even  
21      that very specific argument was even made.

22             JUDGE YOUNG: Okay, let me just -- this is  
23      Judge Young again. Let me just interject here. The  
24      purpose of this conference call is simply to set some  
25      deadlines. So I don't want to open up argument on

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1 various issues.

2 MS. JONES: Understood.

3 JUDGE YOUNG: On the issue of the right or  
4 lack of right or provision for notice of opportunity  
5 for hearing with regard to amendment of materials,  
6 licenses and transfer of materials licenses, the staff  
7 had agreed in response to my request to provide  
8 citations to authority for that. I had asked the  
9 question.

10 Once you provide the authority if the  
11 Petitioners want to file a response, providing any  
12 authority to the contrary, I think that would be  
13 appropriate and we can set deadlines for that. But I  
14 don't want to open up argument on -- legal argument on  
15 those issues at this time. It's just simply a matter  
16 of what is the law on it.

17 So, that takes care of Number 5 and Number  
18 7. It seems like the original deadlines for the staff  
19 on Number 5 and for the Applicant on Number 7 could  
20 probably be a week from today, do you think?

21 MR. SMITH: This is Tyson Smith for Crow  
22 Butte. One week is fine for the citations in Number  
23 7.

24 MS. SIMON: Your Honor, this is Marcia  
25 Simon for the NRC staff. One week is fine for Number

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1 5 also..

2 JUDGE YOUNG: Okay, so today is the 23<sup>rd</sup>,  
3 that would be January 30<sup>th</sup>. And we'll put that for  
4 both of those and then if the Petitioners want to  
5 provide any response, providing any law to the  
6 contrary of what the staff provides, would a week  
7 after that be sufficient for the Petitioners?

8 MR. ELLISON: Well, your Honor, this is  
9 Bruce Ellison. I start four-days of evidentiary  
10 hearings in a habeas murder case in Ohio on the 30<sup>th</sup>.  
11 They're going the 30<sup>th</sup>, 31<sup>st</sup>, and then the following  
12 Monday and Tuesday. So if -- with a week, I would be  
13 getting it as I start my hearing and it would be  
14 practically impossible for any meaningful response in  
15 a week, at least on -- you know, for me.

16 JUDGE YOUNG: When do you think would be  
17 a good time for you?

18 MR. ELLISON: Well, ma'am, if I could have  
19 a number of days past that week, because I'm not going  
20 to be getting back until the 5<sup>th</sup>, possibly the 6<sup>th</sup>.

21 JUDGE YOUNG: Okay, what about the 11<sup>th</sup>?

22 MR. ELLISON: That would be wonderful.

23 JUDGE YOUNG: Okay, so the 11<sup>th</sup> for the  
24 Petitioner's response, February 11<sup>th</sup>. Okay, then on  
25 the Petitioner's Supplemental Statement, how much time

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1 do you need to get those together?

2 MR. FRANKEL: A week would be fine, your  
3 Honor, David Frankel speaking.

4 JUDGE YOUNG: So January 30<sup>th</sup>?

5 MR. FRANKEL: Yes, your Honor, that would  
6 be fine.

7 JUDGE YOUNG: Great, okay. On any --  
8 briefs on the status of NUREGs, did any party -- did  
9 any of the participants want to brief Number 6? I  
10 mean, we -- this is not going to be a requirement.  
11 This is an issue that we can deal with ourselves but  
12 if anyone wants to file a brief on the status of  
13 NUREGs as being in the nature of law, let us know and  
14 we'll set a deadline. I mean, let us know now.

15 MR. FRANKEL: This is David Frankel. Mr.  
16 Ellison, you were the one who referred to that and  
17 there was some discussion of it, so I'm going to defer  
18 to you on that. So do you have any position on that?

19 MR. ELLISON: Well, I guess what I'd like  
20 to encourage is I'd like for us to have further  
21 discussion. If we could have again, that deadline  
22 until the 11<sup>th</sup>, your Honor, if we're going to file  
23 anything further, that we would do so on that date and  
24 obviously, if we don't then there wouldn't be any need  
25 for a response.

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1 JUDGE YOUNG: Okay, any problem with that?

2 MR. ELLISON: Will that work, Mr. Frankel?

3 MR. FRANKEL: Yeah, that works for us.

4 JUDGE YOUNG: Okay. Now, on the law  
5 relating to the treaties and the UN declaration of  
6 indigenous rights, you had asked for one month which  
7 would take us to February 22<sup>nd</sup>.

8 MR. SMITH: Your Honor, this is Tyson  
9 Smith for Crow Butte. Again, with regard to -- it's  
10 not clear to us why it is necessary to do any  
11 briefings on this treaty or these water rights. You  
12 know, we think they raise issues that are outside the  
13 scope of the NRC's jurisdiction in this matter, which  
14 is limited to the Atomic Energy Act and NEPA and  
15 doesn't go to the United States' international  
16 obligations that may have undertaken.

17 In this regard, I guess, you know, we're  
18 not really sure how it's going to tilt NRC's decision,  
19 but if we think that there's some need for further  
20 guidance on this, I think this is the type of issue  
21 that raises a significant and novel legal and policy  
22 issue that might warrant certification to the  
23 Commission for their thoughts on the matter before the  
24 parties have to invest significant resources and time  
25 and effort in drafting some legal brief and it's

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1       unclear exactly what we're supposed to be focusing on  
2       in this area, what the issues are.

3               JUDGE YOUNG: This is something that I  
4       believe I had asked for because in the filings that we  
5       had as of last week, there were references to the  
6       treaties and there were references to the UN  
7       Declaration of Indigenous Rights. So what we'd like  
8       to do is give the parties an opportunity to file any  
9       briefs on these issues to us and then we may or may  
10      not decide, depending upon what we get and what our  
11      own research shows may or may not decide to certify a  
12      question to the Commission. But I don't want to get  
13      into arguments on the merits of it at this point.  
14      Simply to, as I said before, set a deadline.

15             So if we could have everyone file any  
16      briefs that you would like to file on those issues  
17      insofar as they're relevant to the arguments that have  
18      already been raised in the filings and in the oral  
19      argument. Do that by February 22<sup>nd</sup> and then any  
20      responses by a week after that, February 29<sup>th</sup>. And  
21      then that would leave --

22             MR. SMITH: This is Tyson Smith for Crow  
23      Butte again. Could we -- I'm just looking for a  
24      little -- you know, just a brief on treaties and water  
25      rights seems a little amorphous and I guess we're a

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1 little unclear about what exactly the legal issue is  
2 beyond, you know, those that we've raised in terms of  
3 these issues being outside the scope of the proceeding  
4 or outside the zone of interest test for standing.  
5 And so is that what you're looking for is just, you  
6 know, restating what we've said previously at the pre-  
7 hearing conference or is this more of a -- just some  
8 dissertation on you know, what these treaty rights  
9 mean more generally? Any guidance you could give us  
10 on how to frame this would be very helpful. I think  
11 it's a little unclear to us.

12 JUDGE YOUNG: Right. I'd suggest the  
13 first thing you do is go back and read the transcript  
14 and you'll see how it came up in our discussion last  
15 week. The second thing I think you should do is that  
16 the issues arose in the context of the discussion of  
17 Contention C, I believe.

18 MS. JONES: That is correct, Judge.

19 JUDGE YOUNG: Were there contentions where  
20 the -- I think it's only Contention C.

21 MS. JONES: Well, I'm going to let Ms. --  
22 it did come up in the context of Contention C and it  
23 came --

24 THE REPORTER: Excuse me, is this Ms.  
25 Jones?

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1 MS. JONES: -- the water issues and --

2 THE REPORTER: Excuse me, who is speaking?

3 MS. SIMON: Your Honor, it actually -- it  
4 came up in both the --

5 THE REPORTER: Excuse me, who is speaking?  
6 This is the Court Reporter.

7 JUDGE YOUNG: Excuse me, hold on, hold on.  
8 Hold on, the Court Reporter just -- the first person  
9 that was speaking was Ms. Jones, I believe.

10 MS. JONES: Yes, it was. I apologize for  
11 that.

12 THE REPORTER: Ms. Jones.

13 JUDGE YOUNG: Ms. Simon, was that you that  
14 just --

15 MS. SIMON: Yes, this is Marcia Simon.  
16 The Fort Laramie treaties came up in both Petitioner's  
17 replies. I don't have the replies right here with me  
18 but I think they came up also in other context outside  
19 just Contention C. I think they were raised in I  
20 guess kind of a claim that the land where the  
21 operation is located is still within the land  
22 belonging to the Sioux Indians under those treaties.

23 JUDGE YOUNG: Right, I think you're right.  
24 It may have come up with regard to water rights. I  
25 think that's it. And I can actually go to the

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1 transcript myself again if we need to do that but I  
2 suggest you see where it's arisen and see how it was  
3 discussed in the transcript. And the reason for  
4 asking for briefing on this is obviously, this is a  
5 sort of unusual issue of law and so we're going to be  
6 doing research on it and whatever edification the  
7 parties would like to provide on this to us insofar as  
8 it's relevant to the issues before us, provided by the  
9 deadline stated and then if you want to respond to  
10 anything provided by any other parties, that would be  
11 a week later.

12 MR. MCGUIRE: Judge, this is Mike McGuire.  
13 If I can offer an observation or a suggestion; would  
14 it make any sense to bifurcate the issues here and  
15 what I have in mind would be the Commission's  
16 jurisdiction to entertain substantive discussions of  
17 treaties or the United Nations Declarations. I have  
18 the jurisdictional question separated from whatever  
19 substantive part would be here because I don't --  
20 pardon me --

21 JUDGE YOUNG: Mr. McGuire, I think again  
22 you're getting into the merits. To the extent that  
23 you want to argue jurisdictional issues, put them in  
24 your brief, okay?

25 MR. MCGUIRE: All right, thank you.

1 JUDGE YOUNG: Let's not complicate this  
2 more than it needs to be at the outside. If you see  
3 issues, raise them.

4 MR. MCGUIRE: All right, that's fine.

5 JUDGE YOUNG: We're not making any pre-  
6 judgments on the relevance of any of this. We want to  
7 give you the opportunity and ask from you any  
8 edification that you want to provide, any arguments  
9 that you want to make on the issues.

10 MR. MCGUIRE: Thank you. I was trying in  
11 good faith to make it more clear, but fine, we can do  
12 it that way, certainly.

13 JUDGE YOUNG: I think jurisdictional  
14 issues may be part of what you want to brief to us,  
15 but --

16 MR. MCGUIRE: Definitely.

17 JUDGE YOUNG: -- I don't think we're going  
18 to decide those today. Today is simply to schedule  
19 deadlines.

20 MR. MCGUIRE: Yeah, and I was merely  
21 stressing, I guess, two deadlines, a jurisdictional  
22 one and then a substantive one depending on where the  
23 jurisdictional one goes, but you have a different  
24 approach in which this obviously is perfectly fine.  
25 Thank you.

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1 JUDGE YOUNG: I think if we can keep it as  
2 simple as -- the simpler the better in terms of  
3 numbers of deadlines and so forth. Now, we get back  
4 to the numbers 1 and 2. First of all, a week from now  
5 on January 30<sup>th</sup>, the Petitioners are going to notify  
6 us and all parties whether they intend to file any  
7 amended contentions.

8 If you do, and let me just say this, if  
9 you do keep in mind that this is not sort of an open  
10 door to amend your contention in whatever way you see  
11 fit. What we're required to look to here is whether  
12 the provisions of 10 CFR Section 2.309(c) or  
13 2.309(f)(2) or I think the staff has argued in some  
14 circumstances both would come into play, whether there  
15 are any circumstances that would fall under either of  
16 those two sections that would permit the filing of an  
17 amended contention at this point.

18 If you think you have something that would  
19 meet the requirements of either or both of those  
20 sections, then that would be what you would let us  
21 know about a week from today and I think probably we  
22 would need to set a deadline then for any contention  
23 or amended contention that were filed pursuant to  
24 that.

25 The one thing I think it would be good to

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1 avoid is if we're going to set deadlines for the staff  
2 to file responses to Exhibits A and B and to the  
3 timeliness of them under the sections of the rules  
4 that I just cited to you, and then another deadline  
5 for replies to that, then I don't -- I don't think we  
6 want to have a dual track of a new amended contention  
7 based on those documents that would then set up  
8 another series of deadlines for responses and replies.

9 So I guess Mr. Ellison and Mr. Frankel,  
10 when you say you want to consult as to whether to file  
11 any amended contentions, what are you thinking about?  
12 Can you give some insight into what kind of amended  
13 contention you would be wanting to file?

14 MR. FRANKEL: This is David Frankel, your  
15 Honor. Frankly, we would just like to confer between  
16 ourselves and our clients in a privileged context and  
17 from the standpoint of not at all wanting to delay the  
18 Court's or complicate the Court's scheduling, we'd be  
19 willing to, you know, have a -- if we do file an  
20 amended contention, perhaps we could do that within a  
21 fairly short period of time after the 30<sup>th</sup>, say one  
22 week after that so that we could keep things on track.  
23 Would that suit your Honor?

24 JUDGE YOUNG: Well, Mr. Frankel, the  
25 confusion that I'm having right now and what I'm

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1     trying to learn from you is, when you're talking about  
2     an amended contention, are you talking about something  
3     that would be based on Exhibits A and B or something  
4     separate from that?

5                 MR. FRANKEL: No, we would not be talking  
6     about any new material or new information, your Honor.  
7     I have, frankly, not even had a chance to read the  
8     entire transcript yet. So I just want to make sure  
9     that I'm able to answer the question on our intention  
10    concerning an amended contention definitively and with  
11    an appropriate amount of time to consider it. So  
12    that's what I wanted to do with Mr. Ellison and our  
13    clients over the next few days is make sure we weren't  
14    missing something on that.

15                JUDGE YOUNG: Okay, let me just ask you  
16    again. Are you talking about filing an amended  
17    contention that would be related to Exhibits A and B?

18                MR. ELLISON: Your Honor, this is Bruce  
19    Ellison. It would seem to me that the question arose  
20    at the beginning of our -- of this telephonic hearing  
21    about that perhaps we needed to do that to incorporate  
22    A and B.

23                JUDGE YOUNG: No, I didn't mean to suggest  
24    that you needed to. What we wanted to know -- I  
25    noticed a place in the transcript where you mentioned

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1 amended contention or contentions.

2 MR. ELLISON: Yes.

3 JUDGE YOUNG: My question was simply  
4 whether you planned to and since today was the day  
5 that we set to discuss deadlines, I wanted to know if  
6 you plan to, let's set a deadline for that.

7 MR. ELLISON: Right.

8 JUDGE YOUNG: And my question now is to  
9 avoid having dual tracks, addressing the same or  
10 similar issues, the question is simply, if you were to  
11 decide to file an amended contention, would it be  
12 based on Exhibit A and/or B or something else?

13 MR. ELLISON: I would think it would be  
14 based upon A and B. It might also be based upon the  
15 issue that arose as to the licensing notice that came  
16 up during the course of the hearing. And so that all  
17 of the issues that -- we want to make sure -- it's  
18 kind of like -- and again, I profess my ignorance, but  
19 it kind of like would be conforming a complaint to --  
20 or having or modifying a complaint or amending a  
21 complaint to conform to the evidence.

22 JUDGE YOUNG: Right, except that the  
23 amendment -- the contention amendment provisions are  
24 much different than that.

25 MR. ELLISON: And we would like to look at

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1       them, if we may.

2               JUDGE YOUNG: Well, here's the problem.  
3       The purpose of today's telephone conference is to set  
4       deadlines. You filed your Exhibits A and B last week,  
5       so one of the main things that we want to set a  
6       deadline on is the time for the staff and applicant to  
7       file responses to those. Maybe we should just go  
8       ahead and do that.

9               MR. ELLISON: Yes.

10              JUDGE YOUNG: And then if you do file  
11       another contention, we'll just -- maybe there's no way  
12       to avoid -- because I don't want to hold up --

13              MR. FRANKEL: May I interject, your Honor,  
14       this is David Frankel? I think what you're heading  
15       towards here would suit us just fine. Just set the  
16       deadline for the responses to those Exhibits A and B  
17       and we know that we all want to discuss them in the  
18       context of the late filing and the rules concerning  
19       supporting information that we reference. And we  
20       still can stick to a deadline of January 30<sup>th</sup> to  
21       advise the Court and the parties in the event we have  
22       any intention of filing an amended contention so that  
23       we can close off that issue.

24              JUDGE YOUNG: Okay, all right, then for th  
25       staff and applicant, how soon can you file your

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1 responses, both substantive and on the timeliness  
2 aspects of Exhibits A and B?

3 MS. JONES: Judge, this is Andrea Jones  
4 for the staff. Are you specifically asking in  
5 response to any potential filing by the Petitioners?

6 JUDGE YOUNG: No, I'm asking with regard  
7 to Exhibits A and B that were filed last week.

8 MS. JONES: Okay. Perhaps maybe two  
9 weeks.

10 JUDGE YOUNG: Okay.

11 MS. JONES: Is that okay?

12 JUDGE YOUNG: Would that work for you, Mr.  
13 Smith and Mr. McGuire?

14 MR. SMITH: Yeah, this is Tyson Smith for  
15 Crow Butte. That time frame is accessible for us.

16 JUDGE YOUNG: Okay, so that would be  
17 February 5<sup>th</sup>. All right, and then could the  
18 Petitioners file a response a week after that or do  
19 you need two weeks?

20 MR. FRANKEL: Two weeks would be great,  
21 your Honor, David Frankel speaking.

22 JUDGE YOUNG: All right.

23 MS. JONES: Judge, this is -- I'm sorry,  
24 this is Andrea Jones again for the staff. I have a  
25 very special request. I just realized the February

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1 5<sup>th</sup> falls around a religious holiday for me --

2 JUDGE YOUNG: Okay.

3 MS. JONES: -- which I'm scheduled to be  
4 out of state at that time and I was wondering if  
5 everyone would be okay if we maybe pushed it back just  
6 a few more days.

7 JUDGE YOUNG: Okay, what -- suggest a day.

8 MS. JONES: Perhaps the Friday.

9 JUDGE YOUNG: February 8<sup>th</sup>?

10 MS. JONES: Yeah, that gives me time to  
11 get back into Washington, DC.

12 JUDGE YOUNG: Okay, all right February 8<sup>th</sup>  
13 for the number one, the responses to Exhibits A and B  
14 and actually I'm thinking replies under the rules  
15 normally -- hold on a second. Are they seven days or  
16 ten days?

17 MR. SMITH: This is Tyson Smith for Crow  
18 Butte. It's seven days for replies to contentions,  
19 although I guess amended contentions there's not  
20 necessarily and opportunity for reply but I think  
21 seven days would be appropriate.

22 JUDGE YOUNG: Actually, it's seven days  
23 for replies to responses, so -- okay, so actually, so  
24 Mr. Frankel and Mr. Ellison, February 15<sup>th</sup>, I think  
25 would be the normal date for replies. Can you live

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1 with that?

2 MR. FRANKEL: This is David Frankel. Yes,  
3 your Honor.

4 JUDGE YOUNG: Okay, and then meanwhile on  
5 January 30<sup>th</sup>, you're going to inform us whether you  
6 intend to file any new or amended contentions. If you  
7 do, you were saying you could file them then a week  
8 after that which would be February 30<sup>th</sup>? I'm sorry,  
9 excuse me, February 6<sup>th</sup>.

10 MR. FRANKEL: Mr. Ellison, how do you feel  
11 about that?

12 MR. ELLISON: That would be fine.

13 JUDGE YOUNG: Okay, so February 6<sup>th</sup> and  
14 then if anything is filed, then the responses to that  
15 -- let me look again at the rules, answers are 25 days  
16 although if we could shorten that a bit, I'm looking  
17 forward to our schedule in some other cases. How soon  
18 could the staff and applicant get responses in to  
19 anything that might be filed on the 6<sup>th</sup>?

20 MS. JONES: I'm sorry, Judge, on the 6<sup>th</sup>  
21 what exactly would they be filing? I'm sorry, the  
22 amended contention?

23 JUDGE YOUNG: Right, if on January 30<sup>th</sup>,  
24 petitioners indicate that they are going to be filing  
25 any new or amended contentions, then those -- that or

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1 those contention or contentions is -- or amended  
2 contentions as the case may be, would be due February  
3 6<sup>th</sup>. Then how soon could the staff and applicant get  
4 in responses to anything that might or might not be  
5 filed on February 6<sup>th</sup>?

6 MS. SIMON: Your Honor, this is Marcia  
7 Simon. I'm going to suggest, what about February  
8 22<sup>nd</sup>, which is the same day as the briefs on the  
9 treaties are due?

10 JUDGE YOUNG: All right, and then a week  
11 after that would be February 29<sup>th</sup> for replies to that.  
12 Can everyone live with those dates?

13 MR. SMITH: This is Tyson Smith for Crow  
14 Butte. Those are acceptable.

15 MR. FRANKEL: David Frankel for  
16 petitioners, yes, your Honor.

17 JUDGE YOUNG: And Mr. Ellison, are you all  
18 right with that?

19 MR. ELLISON: Yes, ma'am.

20 JUDGE YOUNG: Okay, have we left out  
21 anything?

22 JUDGE OLIVER: Judge Oliver, what about  
23 Number 4? Fred Oliver.

24 JUDGE YOUNG: The supplemental statements  
25 are January 30<sup>th</sup>.

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1 JUDGE OLIVER: Okay.

2 JUDGE YOUNG: Anything else? Well, we  
3 appreciate your time and attention to all these things  
4 today. We will look forward to hearing from you on  
5 all of them. If anything else comes up, we will be  
6 unavailable the first week of February but we will be  
7 available for most of next week and then from --  
8 starting February 11<sup>th</sup> or 12<sup>th</sup> on, we will be available  
9 if anything else arises.

10 Judge Cole, can you think of anything  
11 else?

12 JUDGE COLE: I have nothing further.

13 JUDGE YOUNG: Judge Oliver?

14 JUDGE OLIVER: No.

15 JUDGE YOUNG: All right, well, then thank  
16 you all very much and I will get an order out tomorrow  
17 confirming all these dates. Ms. Thibault, can you  
18 think of anything else that we may have overlooked?

19 MS. THIBAULT: No, I think we've covered  
20 everything.

21 JUDGE YOUNG: Okay, thank you all.

22 (Whereupon, at 3:59 p.m. the above-  
23 entitled matter concluded.)

24

25

CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

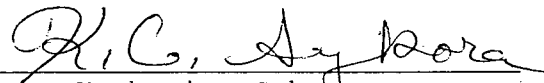
Name of Proceeding: Crow Butte Resources, Inc.

(In Situ Leach Facility)

Docket Number: 40-8943

Location: Teleconference

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
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thereafter reduced to typewriting by me or under the  
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transcript is a true and accurate record of the  
foregoing proceedings.



Katherine Sykora  
Official Reporter  
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