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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment Application for North	)	
Trend Expansion Project)	)	

CROW BUTTE RESOURCES, INC.'S
RESPONSE TO NEWLY-FILED EXHIBITS A AND B

I. INTRODUCTION

In an Order dated January 24, 2008 ("Scheduling Order"), the Atomic Safety and Licensing Board ("Licensing Board") directed the applicant Crow Butte Resources, Inc. ("Crow Butte") to file its response to the petitioners' newly-filed Exhibits A and B from the January 16, 2008 oral argument addressing, *inter alia*, whether the exhibits, insofar as they were provided in support of proposed Contentions A and B, meet the requirements for newly-filed and/or late-filed contentions and amendments to contentions set forth at 10 C.F.R. §§2.309(f)(2) and 2.309(c); and, insofar as the exhibits were provided in support of standing, whether they are timely under relevant law on standing.

For the reasons discussed below, Exhibits A and B do not meet the requirements for late-filed contentions or amendments to contentions. Moreover, the exhibits, even if the Licensing Board determines that they meet the criteria for late-filing, do not provide a basis for an admissible contention. Lastly, the exhibits, to the extent they were offered to support standing, are untimely.

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II. BACKGROUND

A. Standards for Admissibility of Late-Filed and Amended Contentions

The standards governing the admissibility of late-filed and amended contentions are set forth in 10 C.F.R. §§ 2.309(c) and 2.309(f)(2). Where, as here, the issue of an intervenor's standing is being addressed separately, the Board must weigh the following five factors: (1) good cause, if any, for the failure to file on time; (2) the availability of other means whereby the requestor's interest will be protected; (3) the extent to which the requestor's interests will be represented by existing parties; (4) the extent to which the requestor's participation will broaden the issues or delay the proceeding; and (5) the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record.[1]

The first factor, whether good cause exists to allow the late-filed contentions, is entitled to the most weight. *State of New Jersey* (Department of Law and Public Safety), CLI-93-25, 38 NRC 289, 295 (1993). The finding of good cause for late-filing of contentions is related to the "*total previous unavailability* of information."[2] Absent a showing of good cause, the petitioner must make a compelling showing that the remaining four factors warrant admission of the late-filed contentions. *Id.* at 296; *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986). However, findings favorable to the petitioner on some or all of the remaining four factors need not outweigh the effect of inexcusable tardiness. *Public Service Co. of New Hampshire, et al.* (Seabrook Station,

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[1] *See* 10 C.F.R. § 2.309(c)(1)(i), (v)-(viii). The factors in 10 C.F.R. § 2.309(c)(1)(ii)-(iv) are substantially similar to the requirements for standing in 10 C.F.R. § 2.309(d)(1)(ii)-(iv) and are not addressed herein.

[2] *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-83-39, 18 NRC 67, 69 (1983) (emphasis added).

Units 1 and 2), LBP-89-04, 29 NRC 62, 70 (1989), *citing Nuclear Fuel Services, Inc.* (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 275 (1975). The party seeking admission of its late-filed contentions bears the burden of showing that a balancing of the five factors weighs in favor of admitting the late-filed contentions. *See Baltimore Gas and Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 347 n.9 (1998).

Additionally, contentions are initially based on the applicant's Environmental Report ("ER") or Technical Report ("TR"). Intervenors may amend those contentions if there are data or conclusions in the Staff's environmental and technical review documents — for example, the Environmental Assessment ("EA") or Technical Evaluation Report ("TER") — that "differ significantly from the data or conclusions in the applicant's documents." 10 C.F.R. § 2.309(f)(2). Otherwise, contentions may be amended only if (1) the information upon which the amended or new contentions is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information. 10 C.F.R § 2.309(f)(2)(i)-(iii).

Lastly, the proffered late-filed contentions also must meet the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1). In short, a proposed contention must contain (1) a specific statement of the issue of law or fact raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue is within the scope of the proceeding; (4) a demonstration that the issue is material to the findings that the NRC must make regarding the action which is the subject of the proceeding; (5) a concise statement of the alleged facts or expert opinions supporting the contention; and (6) sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.

B. Standards for Curing Defects in Standing

The pleadings requirements of 10 C.F.R. § 2.309 are "strict by design." *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001). However, a Licensing Board may permit potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-8, 39 NRC 116 (1994); *Virginia Electric & Power Co.* (North Anna Power Station, Units 1 & 2), ALAB-146, 6 AEC 631 (1973). Nevertheless, a totally deficient petition should be rejected. *Public Service Electric & Gas Co.* (Salem Nuclear Generating Station, Units 1 & 2), ALAB-136, 6 AEC 487, 489 (1973).

III. DISCUSSION

A. Exhibit A Does Not Meet the Requirements for Late-Filed or Amended Contentions.

Petitioners introduced Exhibit A, which is an email from Hannan Lagarry to Buffalo Bruce dated January 14, 2007, with the subject line "geology summary," at the start of the oral prehearing conference in support of both standing and contentions (*see* Tr. at 66). For the reasons discussed herein, to the extent Exhibit A is offered as the basis for a new contention, it does not meet the standards for late-filed contentions. Similarly, Exhibit A does not satisfy the criteria for amending a previously proposed contention.

At the outset, petitioners have failed to establish "good cause" for late-filing. The references in Exhibit A are all to previously-published material; every reference in Exhibit A is to information that was available prior to and during the opportunity to request a hearing. Indeed, the most recent reference was published back in 1998. While petitioners may argue that

the references and information in the email were not previously available to them, an intervention petitioner has an "ironclad obligation" to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention.[3] *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982). Here, the references in Exhibit A have been publicly available for years, yet petitioners did not discuss them in their initial request for hearing. Petitioners have therefore failed to demonstrate good cause for their late filing.

As to factor two, the availability of other means whereby the requestor's interest will be protected, proposed Contentions A and B challenge, in significant part, NDEQ groundwater restoration standards, water use and withdrawal, and process flows and excursions at the existing facility. Petitioners can and should raise concerns regarding water restoration, use, and withdrawal with the State of Nebraska, which has jurisdiction over those issues. Concerns about process flow rates for the existing facility were the subject of a separate license amendment request filed with NRC and could have been raised with regard to that amendment. Thus, petitioners have other means of protecting their interests.

Factors four and five — the extent to which the requestor's participation will broaden the issues or delay the proceeding; and the extent to which the requestor's participation may reasonably be expected to assist in developing a sound record — are also relevant here. Exhibit A does not provide any explanation as to how references to long-existing, publicly-

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[3] There simply would be "no end to NRC licensing proceedings if petitioners could disregard [the Commission's] timeliness requirements" and add new bases or new issues that "simply did not occur to [them] at the outset." *Duke Energy Corp.* (McGuire Nuclear

available material is relevant to the amendment request at issue. There is no link to or even a mention of the applicant's ER or Technical Report and no reference to any NRC regulations. A Licensing Board should refuse to admit a late-filed contention where the contention is rambling or disorganized such that any attempt to litigate the contention would unduly broaden the issues and delay the proceeding. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1262-1263 (1983). Because Exhibit A fails to explain how it is relevant to the license amendment, any attempt to litigate the contention would broaden the issues and engender delay.

Petitioners have also failed to demonstrate an ability to assist in developing a sound record. A potential intervenor should specify the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 246 (1986). While petitioners have identified a prospective witness, Exhibit A fails to provide any explanation as to how the published references call into question information in the applicant's ER or Technical Report. Nor does Exhibit A explain the significance, if any, of the information with respect to the proposed North Trend expansion. Thus, petitioners have not demonstrated an ability to assist in developing a sound record. Because four of the five factors, including the most important factor — failure to show good cause for late-filing — weigh against admission, Exhibit A should not be admitted.

The introduction of Exhibit A more closely resembles an amendment to a previously proposed contention. The requirements for amending contentions in 10 C.F.R. §

Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 428-29 (2003).

2.309(f)(2) are similar to the "good cause" standard for late-filed contentions. Specifically, contentions may be amended only if (1) the information upon which the amended or new contentions is based was not previously available; (2) the information upon which the amended or new contention is based is materially different than information previously available; and (3) the amended or new contention has been submitted in a timely fashion based on the availability of subsequent information. *See* 10 C.F.R. § 2.309(f)(2). Again, all of the references in Exhibit A were available publicly prior to Crow Butte's filing of its license amendment application. Thus, petitioners have failed to satisfy the criteria in 10 C.F.R. § 2.309(f)(2).

Finally, even if Exhibit A were to be considered by the Licensing Board, Contentions A and B remain inadmissible under 10 C.F.R. § 2.309(f)(1). A simple reference to a large number of publicly available documents does not provide a sufficient basis for a contention. An intervenor must clearly identify and summarize the information being relied upon, and identify and append specific portions of the documents. *Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976). Petitioners must allege deficiencies or errors in the application and also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied,* CLI-03-12, 58 NRC 185, 191 (2003). Exhibit A does none of that. Instead, Exhibit A only provides a listing of published material with no accompanying explanation of how the references call into question the application and no reference to any specific portion of the application.

At the prehearing conference, petitioners' counsel pointed only to ¶ 3 of Exhibit A as supporting their contention (Tr. at 270). But, non-specific reference to possible fault zones

connecting the High Plains aquifer and Chamberlain Pass Formation is insufficient to establish a genuine issue of material fact, particularly when the High Plains aquifer *is not even present* within miles of the North Trend Expansion Area. The High Plains and Chamberlain Pass formations are extensive and cover portions of several states. Vague, generalized statements regarding potential fault zones without reference to a particular geographic area (or relation to the proposed expansion area) are inadequate to raise a genuine dispute with the application, which provides specific, localized information about hydrogeology. For example, the application notes that potentiometric levels (ER, at 3.4-76), aquifer pump tests (ER, at 3.4-76 to 3.4-79), borehole tests and geophysical logs (ER, at Figs. 3.3-7 to 3.3-15), and water quality data (ER, at 3.4-83) all demonstrate hydraulic separation between the Basal Chardon and overlying aquifers. Exhibit A does not even acknowledge, much less address, the considerable evidence in the application. Thus, even if considered, Exhibit A does not provide a basis for admitting Contention A or Contention B.

B. Exhibit B Does Not Meet the Requirements for Late-Filed or Amended Contentions.

Petitioners also introduced Exhibit B during the prehearing conference. Exhibit B is a letter from Steven Fischbein, Nebraska Department of Environmental Quality ("NDEQ"), to Crow Butte Resources dated November 8, 2007. The letter reflects comments from a preliminary review of Crow Butte's Aquifer Exemption Petition for the North Trend Expansion by the State of Nebraska. This document is analogous to a Request for Additional Information ("RAI") used by the NRC Staff in conducting its regulatory reviews. For the reasons discussed herein, to the extent Exhibit B is offered as the basis for a new contention, it does not meet the standards for late-filed contentions. Exhibit B also does not satisfy the criteria for amending a previously proposed contention.

Under longstanding practice, contentions must rest on the *license application*, not on NRC Staff reviews. *See Calvert Cliffs,* CLI-98-25, 48 NRC at 349-50; *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336-39 (1999). In those cases the Commission held that an RAI or an applicant's RAI response do not create a new opportunity for proposing contentions because contentions must be based on the application itself. To satisfy the Commission's contention rule, petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. *Calvert Cliffs*, 48 NRC at 350. Analogously, a contention cannot simply be based on a comments by a state agency regarding a permitting issue separate from the NRC's review, especially where the contention could have been drafted based on the original application and environmental report. The NDEQ Staff's mere posing of questions on the aquifer exemption petition does not suggest that the application before the NRC is incomplete, or that it provided insufficient information to frame contentions for the NRC proceeding. Indeed, were the license amendment application as rife with serious omissions as petitioners suggest, then they should have had no problem identifying such inadequacies. Yet, they have not done so.

With regard to the late-filing factors, petitioners have not demonstrated good cause for late filing. As discussed above, a contention cannot simply be based on a comments by a state agency regarding a permitting issue apart from the NRC's review where the contention could have been drafted based on the original application and environmental report. As to factor two, the petitioners' interests regarding the aquifer exemption petition can be protected apart from the NRC's review of the license amendment during the NDEQ's permitting process.

Petitioners likewise fail to satisfy factor four or five. Exhibit B does not provide any analysis, discussion, or information of petitioners' own on any of the issues raised by

NDEQ. There is no specific reference to Crow Butte's application or ER. Failure to provide factual information and expert opinions regarding the bases of a proffered contention requires the contention be rejected. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Litigation of unfocused, unexplained contentions would clearly broaden the proceeding and create delay. Further, as discussed above, petitioners have done nothing more than point to NDEQ's preliminary reviews of the aquifer exemption petition. There is no indication that they are capable of providing independent analysis of issues discussed therein. Thus, petitioners have not demonstrated an ability to assist in developing a sound record. On balance, petitioners have failed to satisfy the late-filed criteria in 10 C.F.R. § 2.309(c).

Exhibit B also fails to satisfy the criteria for amending a contention in 10 C.F.R. § 2.309(f)(2). Nothing in Exhibit B is based on information that is different from information available in applicant's application and ER. Moreover, the few references identified in Exhibit B are to materials published nearly a decade ago. As discussed in greater detail above, simply pointing to the NDEQ RAI is inadequate to support a contention; petitioners must explain how the information in Exhibit B is materially different than the information previously available. Having failed to satisfy the criteria in 10 C.F.R. § 2.309(f)(2), petitioners' Exhibit B should not be admitted.

Finally, even if Exhibit B were to be admitted, Contentions A and B remain inadmissible under 10 C.F.R. § 2.309(f)(1). To satisfy the Commission's contention rule, petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. *Calvert Cliffs*, 48 NRC at 350. Merely pointing to RAIs of another agency — in an entirely different regulatory context — is a far cry from the specificity the Commission's

contention rule demands. Here, to support Contentions A and B, petitioners point to the NDEQ RAIs without any supporting details. A contention alleging that an application is deficient must identify "specific portions of the application [ ] that the petitioner disputes and supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). All the petitioners did here was introduce the NDEQ letter. Exhibit B simply reflects areas where NDEQ has made further inquiries. The petitioners themselves provided no analysis, discussion, or information of their own on any of the issues raised in the RAIs. Apart from a broad reference to these follow-up questions posed by NDEQ Staff, the petitioners did not posit any reason or support of their own — no alleged facts and no expert opinions — to indicate that the application is materially deficient. Providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *See Fansteel, Inc.* (Muskogee, Oklahoma, Site), CLI-03-13, 58 NRC 195, 205 (2003). Petitioners seeking to litigate contentions must do more than attach a list of RAIs and declare an application "incomplete." It is their job to review the application, to identify what deficiencies exist and to explain why. Exhibit B does none of that, and therefore cannot support an admissible contention.

For all of the above reasons, Exhibit B should not be admitted.

C. Exhibits A and B Were Not Timely Filed To Support Standing.

To the extent that petitioners are relying on Exhibits A and B to support standing, the exhibits are untimely. As the Commission noted recently in reference to its increasing adjudicatory docket, the need for parties to adhere to pleading standards and for the Board to enforce those standards are paramount. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-25, 60 NRC 223, 225 (2004). Nevertheless, Licensing Boards have permitted

potential intervenors to cure defects in petitions in order to obviate dismissal of an intervention petition because of inarticulate draftsmanship or procedural or pleading defects. *See, e.g., VEPCO*, ALAB-146, 6 AEC 631 (1973). Those cases, however, generally involved procedural or pleading defects, such as failures to authorize an organization to represent an individual or failures to submit affidavits under oath. Indeed, in this proceeding, the Licensing Board has given petitioners several opportunities to supplement their standing declarations. Petitioners have provided supplemental standing affiants to provide representatives for Owe Aku and Western Nebraska Resources Council ("WNRC"),[4] to augment their original standing declarations,[5] and to specify when individual affiants became members of WNRC (*see* Scheduling Order, at 1). But, allowing tardy exhibits offered to establish purported injury-in-fact would be completely different from curing minor pleading defects and is therefore inappropriate. Furthermore, while it may understandable to hold *pro se* petitioners to less rigid standards for pleading, here, petitioners are represented by counsel.

There simply would be no end to NRC licensing proceedings if petitioners could disregard the Commission's timeliness requirements and continue to supplement and augment standing declarations indefinitely. For these reasons, Exhibits A and B are untimely to the extent they are offered in support of standing.

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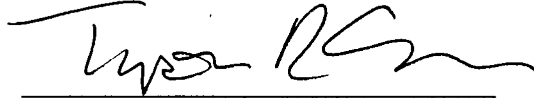
4 *See* Order (Confirming Matters Addressed on December 18, 2007 Telephone Conference), at 2 (December 20, 2007); *see also*, Order (Ruling on Petitioner Owe Aku's Motion for Extension of Time), at 1 (January 4, 2008), which granted a further extension of time in which to file supplemental standing affidavits.

5 The NRC Staff and Crow Butte have both requested that the Board strike portions of the supplemental standing affidavits for *individuals* on the grounds that they exceeded the scope of the Licensing Board's Order, which was limited to supplemental affidavits in support of *representational* standing.

Even if accepted as timely, Exhibits A and B do not cure the failure of the affiants to demonstrate an injury-in-fact. Standing should be denied where the threat of injury is too speculative. Petitioners provide no explanation as to how Exhibits A or B demonstrate a risk of injury to any of the affiants. To constitute an adequate showing of injury-in-fact within a cognizable sphere of interest, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001). Petitioners have introduced nothing that calls into question the license application's conclusion that the Basal Chadron is hydraulically separated from the Brule aquifer. *See*, *infra*, at 7-8. Moreover, Exhibits A and B do not show any "distinct new harm of threat apart from the activities already license." *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 251 (2001). The alleged injury from Crow Butte's expansion is simply too speculative, and would involve compounding supposition upon supposition — bordering on the physically impossible — in order to occur as posited by petitioners. Thus, Exhibits A and B, even if considered by the Licensing Board, are insufficient to demonstrate standing.

IV. CONCLUSION

For the reasons discussed above, neither Exhibit A nor Exhibit B should be accepted in support of proposed Contentions A or B. Furthermore, Exhibit A and Exhibit B are untimely to the extent they are offered in support of standing.



Tyson R. Smith
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817

COUNSEL FOR CROW BUTTE
RESOURCES, INC.

Dated at Washington, District of Columbia
this 8th day of February 2008

February 8, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment Application for North Trend Expansion Project)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES, INC.'S RESPONSE TO NEWLY-FILED EXHIBITS A AND B" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 8th day of February, 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

Administrative Judge*
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: AMY@nrc.gov)

Administrative Judge*
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: RFC1@nrc.gov)

Administrative Judge*
Frederick W. Oliver
Atomic Safety and Licensing Board Panel
10433 Owen Brown Road
Columbia, MD 21044
(e-mail: FWOliver@verizon.net)

Office of Commission Appellate Adjudication*
Mail Stop: O-16 G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: OCAAmail@nrc.gov)

Office of the Secretary*
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(original + two copies)
(e-mail: HEARINGDOCKET@nrc.gov)

Andrea Z. Jones, Esq.*
Marcia J. Simon, Esq.*
Catherine Marco, Esq.*
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop: O-5 D21
Washington, DC 20555-0001
(e-mail: axj4@nrc.gov)
(e-mail: mjs5@nrc.gov)
(e-mail: clm@nrc.gov)

Stephen P. Collings, President*
Crowe Butte Resources, Inc.
141 Union Boulevard, Suite 330
Lakewood, CO 80228
(e-mail: steve_collings@cameco.com)

Mark D. McGuire, Esq.*
McGuire and Norby
605 South 14th Street, Suite 100
Lincoln, NE 68508
(e-mail: mdmsjn@alltel.net)

David C. Frankel, Esq.*
P.O. Box 3014
Pine Ridge, SD 57770
(e-mail: dfrankel@igc.org)

Debra White Plume*
P.O. Box 71
Manderson, SD 57756
(e-mail: LAKOTA1@gwtc.net)

Bruce Ellison, Esq.*
Law Offices of Bruce Ellison
P. O. Box 2508
Rapid City, SD 57709
(e-mail: belli4law@aol.com)

Johanna Thibault, Law Clerk*
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
(e-mail: JRT3@nrc.gov)

Thomas Kanatakeniate Cook*
1705 S. Maple Street
Chadron, NE 69337
(e-mail: tcook@indianyouth.org)

Owe Aku, Bring Back the Way*
Attn: Debra White Plume
P.O. Box 325
Manderson, SD 57756
(e-mail: LAKOTA1@gwtc.net)

Slim Buttes Agricultural Development Corporation*
Attn: Joseph American Horse, Sr., President
1705 Maple Street
Chadron, NE 69337
(e-mail: slmbttsag@bbc.net)

Western Nebraska Resources Council*
Attn: Buffalo Bruce
P.O. Box 612
Chadron, NE 69337
(e-mail: buffalobruce@panhandle.net)

Tyson R. Smith
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817

COUNSEL FOR CROW BUTTE RESOURCES, INC.