RAS 15115

February 22, 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)	)	

CROW BUTTE RESOURCES, INC.'S BRIEF ON TREATIES AND UNITED NATIONS DECLARATION

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") and parties to file briefs on any law relating to the 1851 and 1868 Fort Laramie Treaties, and relating to the United Nations Declaration of Indigenous Rights, insofar as these may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts.

For the reasons discussed below, neither the Fort Laramie Treaties nor the UN Declaration Indigenous Rights is relevant to standing or to the admissibility of any proposed contentions.

II. BACKGROUND

A. Standing

Under 10 C.F.R. § 2.309(d), to establish standing a petition to intervene must set forth the nature of the petitioner's right to be made a party, the nature of the petitioner's interest in the proceeding, and the possible effect on that interest of any decision or order that may be

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issued in the proceeding. In assessing such a showing, the Commission has long applied judicial concepts of standing. Specifically, a petitioner must demonstrate (1) that the proposed action will cause an "injury-in-fact" that is within the "zone of interests" protected by the governing statute; (2) that the injury can be fairly traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision in the proceeding. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996); *Georgia Institute of Technology* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). More specifically, a petitioner must allege an "injury-in-fact" that is within the "zone of interests" protected by the Atomic Energy Act ("AEA") or the National Environmental Policy Act of 1969 ("NEPA"). *Niagara Mohawk Power Corp.* (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213, 215 (1983).

B. Standards for Admissibility of Contentions

Under 10 C.F.R. § 2.309(f)(1), for each proposed contention the petitioner must:

(i) Provide a specific statement of the issue of law or fact to be raised or controverted;

(ii) Provide a brief explanation of the basis for the contention;

(iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;

(iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;

(v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and

(vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.

The Commission has emphasized on numerous occasions that these standards are to be strictly applied. *See, e.g., Arizona Public Service Company, et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), CLI-91-12, 34 NRC 149, 155 (1991) ("if any one of these requirements is not met, a contention must be rejected"); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 212-13 (2003). In particular, the Commission will not accept vague, unparticularized issues, unsupported by alleged fact or expert opinion and documenting support. *Oyster Creek*, CLI-00-6, 51 NRC at 203, *citing North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Likewise, issues outside the scope of the required NRC review and hearing notice cannot be admitted. *Portland Gen. Elec. Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289-90 n. 6 (1979). Under these standards, petitioners' proposed contentions are not admissible.

III. DISCUSSION

A. Petitioners Have Not Demonstrated An Injury Within the Zone of Interests of the AEA or NEPA.

1. Fort Laramie Treaties

Debra White Plume provided a supplemental standing affidavit for Owe Aku to augment its original standing declarations[1] and Joseph R. American Horse, Sr. provided an affidavit in support of Slim Buttes Agricultural Development Corp. ("Slim Buttes"). Both of

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[1] The NRC Staff and Crow Butte have both requested that the Board strike portions of the supplemental standing affidavits for Debra White Plume *as an individual* on the grounds that Owe Aku exceeded the scope of the Licensing Board's Order, which was limited to supplemental affidavits in support of *representational* standing.

those standing affidavits reference the 1851 and 1868 Fort Laramie Treaties. In her affidavit, Ms. White Plume states that "the area where [Crow Butte] is mining and proposes to expand its mine is within the 1851 and 1868 Ft. Laramie Treaty boundaries of which my ancestors, including Red Cloud, signed on behalf of the Lakota." In his affidavit, Mr. American Horse states that the "Oglala Sioux Tribe, among other tribes of the Great Sioux Nation, possess superior water rights in the region, never quantified, arising from federal treaties with the Great Sioux Nation in 1851 and 1868." Neither of these statements is sufficient to establish an injury-in-fact within the zone of interests of the AEA or NEPA.

As an initial matter, neither of the statements regarding the Fort Laramie Treaties alleges an injury-in-fact. Ms. White Plume's reference to the Ft. Laramie Treaty boundaries is a simple statement of geography — that is, the affidavit contains only a description of the location of CBR's mining activities relative to the treaty boundaries. Ms. White Plume does not state how or to what extent Crow Butte's North Trend Expansion will cause her harm or will harm her interests, if she has any, under those treaties. Similarly, Mr. American Horse references water rights "in the region." He does not provide any concrete or particularized injury associated with the specific activities at Crow Butte's North Trend Expansion. Thus, in both instances, the vague references to the Fort Laramie treaties are insufficient to demonstrate the injury-in-fact required to support standing.

Likewise, neither of the affidavits raises an issue within the zone of interests of the AEA or NEPA. The hearing petitioners — in this case, Ms. White Plume and Mr. American Horse — bear the burden of establishing that the various injuries alleged to occur to its AEA-protected health and safety interests or its NEPA-protected environmental interests satisfy the three components of the injury in fact requirement. *Babcock and Wilcox* (Apollo, Pennsylvania

Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 81 (1993). In the context of this licensing action, the AEA is concerned exclusively with the radiological impacts of a proposed project.[2] Similarly, the NRC Staff's environmental review under NEPA is focused on the environmental impacts of a project. To the extent that NEPA does extend to impacts on cultural and historic resources, no specific harm is alleged here. The mere reference to the Fort Laramie treaties adds nothing to establish standing on this basis. Moreover, there is simply no role for the NRC under the AEA or NEPA in adjudicating or assessing inter-governmental agreements and treaties made by the U.S. Government with other tribes, nations, or sovereigns. *See Hydro Resources Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC __, slip op. at 4 (2006) ("While the NRC recognizes the tribal sovereignty of the Navajo Nation, it is not the function of the EIS process to resolve existing or potential jurisdictional disputes [over water rights]."). The NRC is not equipped, or authorized, to assess the Federal Government's compliance with its obligations under the Fort Laramie Treaties. Nor is there any indication that Crow Butte, as a private applicant, has any role or obligation under the treaties. Further, the petitioners, who are private individuals submitting affidavits in support of organizations, have made no showing that any injury under the treaty accrues to them, rather than to the tribal signatories of the treaties.

Moreover, to the extent that petitioners have even alleged an injury (*e.g.*, a violation of treaty rights), injuries to petitioners arising from the actions of parties other than the applicant (in this case, the Federal Government and/or States) do not fall within the zones of interest arguably protected by the AEA or NEPA. In short, the injury of which the petitioners

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[2] Some sections of the AEA address international trade and commerce in nuclear material and components. *See e.g.*, 42 U.S.C. § 2112 (export licensing). These sections, however, are unrelated to the licensing of a uranium recovery facility.

complain was not a result of the disputed application. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 124 (2000). For these reasons, the Fort Laramie Treaties cannot be used in support of standing.

2. *UN Declaration of Indigenous Rights*

None of the standing affiants in this proceeding references the UN Declaration of Indigenous Rights in their affidavits. Instead, the injuries in the affidavits are focused on impacts to individuals, such as air and water contamination. Thus, there is no specific alleged injury-in-fact associated with the UN Declaration.

Moreover, if an injury-in-fact were alleged with respect to rights arising the UN Declaration, that injury would not be within the zone of interests to be protected by the AEA or NEPA. As discussed above, the AEA is focused on radiological impacts, not international or human rights issues. Likewise, NEPA is focused on disclosing environmental impacts generally, and in that regard, would address potential impacts to the population at large, including indigenous peoples. No specific impacts on cultural or historic resources are alleged. Beyond that, there is simply no role for the NRC under the AEA or NEPA in adjudicating or assessing United Nations declarations or other international issues involving U.S. foreign policy. The NRC is not equipped, or authorized, to assess the Federal Government's compliance with its obligations as a member of the United Nations. For these reasons, there is no injury-in-fact within the zone of interests to be protected by the AEA or NEPA associated with the UN Declaration.

B. Neither the Fort Laramie Treaties nor the UN Declaration on Indigenous Rights Provides a Basis for an Admissible Contention.

1. Fort Laramie Treaties

A basis for a contention is set forth with reasonable specificity if an applicant is sufficiently put on notice so that it will know, at least generally, what it will have to defend against or oppose, and if there has been sufficient foundation assigned to warrant further exploration of the proposed contention. *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-1, 19 NRC 29, 34. (1984). Under 10 C.F.R. § 2.309(f)(1)(i)-(ii), reasonable specificity requires that a contention include a reasonably specific articulation of its rationale. Contentions must give notice of facts which petitioners desire to litigate and must be specific enough to satisfy the requirements of 10 CFR § 2.309(f)(1). Here, however, the Fort Laramie treaty is not referenced or mentioned in the reference petition. With no reference, there can be no rationale. A contention that simply alleges that some general, nonspecific matter ought to be considered does not provide the basis for an admissible contention. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 246 (1993).

Similarly, the petition fails to provide a concise statement of the alleged facts or expert opinions that support the petitioner's position on the effect of the Fort Laramie treaties. There are no references to the specific sources and documents on which the petitioner intends to rely to support its position on the issue. Simply put, there is no apparent link or nexus between the treaties and any of the proposed contentions. In such circumstances, the licensing board may not supply missing information or draw inferences on behalf of the petitioner. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001). The dearth of any explanation as to the significance, if any, of the Fort Laramie

treaties with respect to the North Trend Expansion means that the treaties cannot be used to support an admissible contention.

Along these lines, under section 2.309(f)(1)(vi), a contention is inadmissible where it fails to contain sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact and does not include references to the specific portions of the application that petitioners may dispute. *Texas Utilities Company, et al.*, (Comanche Peak Steam Electric Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992). Again, the reference petition draws no link between the Fort Laramie treaties and the findings that the NRC must make under the AEA or NEPA. Thus, there can be no genuine dispute on an issue of law or fact related to the treaties that supports an admissible contention.

For all of the above reasons, the Fort Laramie treaties do not provide a basis for an admissible contention in this proceeding.

2. *UN Declaration of Indigenous Rights*

In the reference petition, petitioners include a paragraph under "Relevant Facts" that states:

> International human rights standards indicate that Indigenous peoples' whose lands are affected by development projects have the right to "free, prior and informed consent." In the Declaration on the Rights of the World's Indigenous Peoples ("Declaration"), Article 32, ¶ 1, "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources," and ¶ 2, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources," and ¶ 3, "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact." (See General Assembly Resolution A/61/L.67 of 7 September 2007.) To date,

> no opportunity has been provided under this applicable provision of the Declaration for members of the Oglala (Lakota) Sioux Tribe, its members or representative institutions to analyze CBR's License Amendment or its affect on lands, territories and resources. A favorable decision permitting intervention would provide this opportunity.

Contrary to petitioners' assertions, the UN Declaration does not create an enforceable obligation on the part of the applicant or the NRC. According to Robert Hagen, U.S. Advisor, in "Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples," it is the "clear intention of all States that [the declaration] be an aspirational declaration with political and moral, rather than legal force."[3] Moreover, the declaration "is not in itself legally binding nor reflective of international law." *Id.* Although petitioners would have the declaration serve as a basis for an admissible contention, the United States noted that "[the] declaration does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings." *Id.* Thus, the declaration cannot create a genuine dispute with the applicant on a material issue of law in this proceeding.

The United States chronicled other shortcomings of the UN Declaration in its observations that further render it outside the scope of this proceeding. For example, the declaration, if implemented as written, would require recognition of indigenous rights to land without regard to other legal rights existing in land, either indigenous or non-indigenous. Such an outcome would require countries to ignore "contemporary realities" by "announcing a standard of achievement that would be impossible to implement." *Id.* In contrast to the sweeping language of the declaration, the NRC's jurisdiction under the AEA is limited to issues of radiological health and safety. An NRC hearing on a uranium recovery project is not the

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[3] *See* United States Mission to the United Nations, USUN Press Release #204(07) (Sept. 13, 2007), *available at* http://www.un.int/usa/press_releases/20070913_204.html.

proper forum for adjudicating the appropriate balance among indigenous and non-indigenous rights to land and other natural resources. Any determinations as to the private property rights of the applicant or indigenous peoples are questions that lie far outside the scope of this proceeding, which is limited to the narrow set of issues associated with a license amendment to authorize the North Trend Expansion.

The text could also be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples' free, prior and informed consent before passage of any law that may affect them. The United States remarked that it strongly supports the full participation of indigenous peoples in democratic decision-making processes, but "could not accept the notion of a sub-national group having a 'veto' power over the legislative process."[4] *Id.* Again, an NRC hearing on a license amendment is not the proper forum for adjudicating whether the Oglala (Lakota) Sioux Tribe, which is not even a party to this proceeding, has the authority, under a broad, aspirational UN Declaration, to "veto" an activity that is otherwise authorized under the AEA. These types of questions lie well outside the jurisdiction of the NRC under either the AEA or NEPA and are therefore outside the scope of the proceeding.

For all of these reasons, the UN Declaration cannot be used as a basis to support an admissible contention.

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[4] With respect to existing democratic decision-making processes, indigenous peoples have several opportunities to participate in NRC-regulated activities. Obviously, an interested person may petition to participate in an NRC licensing proceeding such as this one. In addition, any person may comment on NRC environmental review documents, such as an Environmental Assessment, or provide comments on a proposed rulemaking. In this regard, the UN Declaration is neither the only nor the most direct mechanism for ensuring that the concerns of indigenous peoples are taken into account in NRC decisions.

IV. CONCLUSION

For the reasons discussed above, neither the Fort Laramie Treaties nor the UN Declaration on Indigenous Rights is relevant to standing or to the proposed contentions.

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Dated at Washington, District of Columbia
this 22nd day of February 2008

February 22, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES, INC.'S BRIEF ON TREATIES AND UNITED NATIONS DECLARATION" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 22nd day of February 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

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