February 29, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CROW BUTTE RESOURCES, INC.'S CONSOLIDATED RESPONSE TO BRIEFS 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 the other 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 proposed contentions concerning water rights and consultation with Native Americans on historical sites and artifacts. On February 21, 2008, the Nuclear Regulatory Commission ("NRC") Staff filed their brief. Crow Butte and Petitioners filed their initial briefs on February 22, 2008.[1] Pursuant to the Scheduling Order, Crow Butte hereby submits a consolidated response to the NRC Staff and petitioners' briefs on the Fort Laramie treaties and the UN Declaration.

---

[1] Two separate motions for leave to file a brief *amicus curiae* were filed on that same date. Crow Butte intends to file an answer to those motions under 10 C.F.R. § 2.323(c).

First, Crow Butte objects to the petitioners brief as far outside the scope of the opportunity presented by the Licensing Board. Beyond that, petitioners arguments regarding the Fort Laramie treaties and UN Declaration can be distilled to two points: (1) contamination of water to which the tribes have rights would support standing; and (2) failure to properly consult with tribal authorities as required by the UN Declaration would be an admissible contention. But, as discussed below, in reality, petitioners have failed to show an redressible injury caused by applicant with respect to water contamination — petitioners cannot rely on injuries to third parties to support standing and there is no physically possible mechanism for contamination at the Pine Ridge Reservation. Moreover, petitioners have not shown that there is a genuine dispute of law or fact with regard to consultation — there is no legal obligation for the applicant or NRC to consult under the UN Declaration and, in any event, the obligation under the National Historic Preservation Act to consult on historic and cultural resources only applies to the NRC.

Accordingly, for the reasons discussed below and those in our February 22, 2008 brief, neither the Fort Laramie Treaties nor the UN Declaration Indigenous Rights is relevant to standing or to the admissibility of any of the proposed contentions in the proceeding. Crow Butte also agrees with and hereby adopts the arguments of the NRC Staff in their February 21, 2008 briefing on the Fort Laramie treaties and the UN Declaration.

II. DISCUSSION

A. Petitioners Brief Exceeds Scope of Licensing Board Order

Petitioners' brief far exceeds the scope of the limited opportunity for briefing provided by the Licensing Board in its Scheduling Order. The Board permitted the parties to provide a briefing on the Fort Laramie treaties and UN Declaration "insofar as these may be relevant to standing and any contentions concerning water rights and consultation with Native

Americans on historical sites and artifacts." Scheduling Order, at 2. At the January 16, 2008 prehearing conference, petitioners only referred to the Ft. Laramie treaties as bases for standing with respect to Contentions A and C. *See* Tr. at 86, 100, 186-188, 304, 307. Similarly, petitioners only referenced the UN Declaration in discussing Contentions A and C. *See* Tr. at 100, 304, 307. However, in their brief, petitioners attempt to broaden the scope of the brief to include Contentions B and F. *See* Pet. Brief, at 1. Out of fairness to the other parties in the proceeding and in order to maintain an orderly proceeding, the Licensing Board should ignore the petitioners' brief to the extent that it exceeds the scope of the Board's Scheduling Order.

Petitioners' brief also exceeds the scope of the Scheduling Order in another important respect. Again, the Board permitted the parties to brief the Fort Laramie treaties and UN Declarations only "insofar as these may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts." Scheduling Order, at 2. The petitioners, however, have introduced entirely new bases and legal theories to support their proposed contentions. These bases, to the extent that they would even support an admissible contention, are too late. The supplemental briefing opportunity goes only to the narrow question of the applicability of the treaties and the UN Declaration to the issues of standing and the admissibility of contentions. It was not an opportunity to submit new bases or expanded contentions.

For example, there is no logical nexus between the treaties/UN Declaration and the Religious Freedom Restoration Act (Pet. Brief, at 17), the Native American Graves Protection and Repatriation Act (Pet. Brief, at 24), or the American Indian Religious Freedom Act (Pet. Brief, at 25). The latter three statutes were all mentioned for the first time in the

petitioners' brief as a basis for the proposed contentions.[2] Similarly, the petitioners raise new issues regarding hunting and fishing rights (Pet. Brief, at 10) and provide new arguments about the applicability of the Clean Water Act ("CWA") to the North Trend Expansion (Pet. Brief, at 36).[3] The petitioners' brief also mentions the President's Executive Orders on "Government-to-Government Relations with Native American Tribal Governments" (Pet. Brief, at 12) and "Federal Actions to Address Environmental Justice in Minority and Low-Income Populations" (Pet. Brief, at 26) — all for the first time.

The portion of the petitioners' brief discussing these newly-raised statutes, orders, and rights, as well as their argument regarding application of these statutes (Pet. Brief, at 45-47) and rights (Pet. Brief, at 48), should be rejected as beyond the scope of the Board's Scheduling Order.

Alternatively, these new contentions should be rejected because petitioners have failed to address the late-filed contention standards in 10 C.F.R. § 2.309. With respect to demonstrating an admissible contention, the burden of proof is on the petitioner. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-16, 51 NRC 320, 325 (2000). A person who files an untimely intervention petition must affirmatively address the

---

2 These arguments are perhaps better styled as new late-filed contentions. In any event, they would be inexcusably late and would not support an admissible contention.

3 With respect to the alleged CWA issues (Pet. Brief at 33-37), petitioners' contention also raises issues that are outside the scope of the NRC proceeding. Discharge permits, water quality standards, and aquifer exemptions are the responsibility of the Nebraska Department of Environmental Quality ("NDEQ"), as authorized by the Environmental Protection Agency ("EPA"). The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

lateness factors in his petition.[4] Failure to do so is grounds for rejecting the late-filed or amended contention.

In this proceeding, petitioners have been given numerous opportunities to supplement or otherwise augment their petitions, yet they have again failed to properly address the criteria for newly-filed or amended contentions. Orderly resolution of the proceeding requires that parties adhere to the NRC's rules of practice. The Licensing Board should not permit petitioners to ignore with impunity the NRC's rules, which the Commission designed to balance the rights of the public to participate in proceedings with the public interest in timely resolution of NRC proceedings.

B. Petitioners Fail to Demonstrate Standing

Although petitioners assert repeatedly that legal principles, such as the *Winters* doctrine and Reserved Rights doctrines, support standing in this proceeding (*see, e.g.*, Pet. Brief, at 12), their reliance is misplaced. Those doctrines discuss rights *of the tribe*, not those of individuals. This flaw in the petitioners' logic can be found throughout the brief and undermines the entirety of their arguments with respect to standing based on the Fort Laramie treaties or the UN Declaration.

---

[4] Even if petitioners had addressed the late-filed and amended contention factors, they would not satisfy the "good cause" factor for late-filing or any of the amended contention factors. Petitioners have not, and cannot, put forth any compelling rationale for accepting these new legal bases for the proposed contentions. Their opportunity to submit proposed contentions ended *more than three months ago*. The key policy consideration for barring late intervenors is one of fairness — that is, "the public interest in the timely and orderly conduct of our proceedings." *Houston Lighting and Power Co.* (South Texas Project, Units 1 and 2), ALAB-549, 9 NRC 644, 648-649 (1979). That consideration is at its maximum here, where the petitioners have already been given several opportunities to augment and reargue their initial petition.

For example, the brief argues that petitioners have standing to raise contentions regarding degradation of water quality within the treaty boundaries because certain petitioners are descendants of the signers of the Fort Laramie treaties. Pet. Brief, at 31. However, an injury to the tribal interests cannot support standing for individuals in the NRC proceeding. Petitioners must allege an "injury-in-fact" which they will suffer as a result of a Commission decision; they may not derive standing from the interests of another person or organization, nor may they seek to represent the interests of others without their express authorization. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329-30 (1989); *see also*, *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 387, *aff'd*, ALAB-470, 7 NRC 473 (1978) (denying standing asserted by a mother on behalf of her son who attended medical school near a proposed facility).

Beyond the lack of standing to represent the interests of others, petitioners also fail to demonstrate an injury caused by the applicant that is redressible in this proceeding. In their brief, petitioners repeat misguided arguments from earlier pleadings regarding "US Drinking Water source [sic]" and potential contamination of the Arikaree aquifer. Pet. Brief at 33-34. Neither of these arguments supports standing. First, NDEQ (under authority from the EPA) makes determinations on aquifer exemption requests and also determines whether an aquifer is considered an Underground Source of Drinking Water. Because the aquifer exemption approval is outside the scope of the NRC proceeding, it is not redressible by the NRC.

Even more fundamentally, petitioners have also not demonstrated a potential for contamination of the Arikaree aquifer. Therefore, there is no showing of harm in support of standing. Petitioners discuss their use of the Arikaree aquifer at the Pine Ridge Reservation (between 20 and 40 miles from the site), but fail to fully disclose the geophysical relationship

between the Arikaree aquifer and the North Trend Expansion Area. In the North Trend Expansion Area, the Arikaree aquifer *does not exist*. The geologic formation that makes up the Arikaree aquifer is *above* the ground surface.[5] As the formation stretches toward the Pine Ridge Reservation, it extends below the ground surface and becomes the Arikaree aquifer. Thus, it may be technically correct, as stated in Exhibit A, for "surface spills south of the Pine Ridge Indian Reservation" to transmit "through porous sandstone from the Ogallala and the Arikaree groups directly into the High Plains Aquifer," because that is the natural flow direction at the Pine Ridge Reservation and both formations exist below the surface at that location. Significantly, petitioners did not, and could not, state the opposite — that water in the Brule in the North Trend Area could contaminate the Arikaree — because *the Arikaree is not present at the North Trend Area*. Nor, in the area of Pine Ridge would water in the Brule move upgradient — that is, against the natural flow direction — into the Arikaree. So, while the petitioners' statements regarding flow downward into the Brule in the vicinity of Pine Ridge may be technically correct, the converse (*i.e.*, flow upward into the Arikaree) would not be. Groundwater cannot flow in both directions simultaneously. To the extent petitioners imply that actual conditions would permit flow in either direction, that implication is misleading and inconsistent with the laws of physics. In the absence of a potential contamination pathway, there can be no injury and therefore no standing regardless of water rights under the treaties or the significance of water to indigenous people.

---

[5] As discussed at the prehearing conference, tops of the hills and ridges near Crow Butte are the geologic formation that is the Arikaree aquifer in the vicinity of the Pine Ridge Reservation. Tr. at 135; *see also* "Crow Butte Resources, Inc.'s Response To Newly-Filed Exhibits A and B," at 7-8 (Feb. 8, 2008).

For these reasons, as well as those discussed in our February 22, 2008 brief and the February 21, 2008 brief of the NRC Staff, the Fort Laramie treaties and UN Declaration cannot support petitioners' standing.

C. The Fort Laramie Treaties and UN Declaration Do Not Provide a Basis for an Admissible Contention

Petitioners brief undermines their own arguments with respect to the applicability of the UN Declaration. In Section I.J of their brief (Pet. Brief, at 26), petitioners acknowledge that the UN Declaration is a "non-binding" text. That admission alone undermines the use of the declaration as a basis for an admissible contention (which must be based on a genuine dispute of law or fact). Further, petitioners go on to mistakenly cite environmental justice strategies of the EPA and the Department of Energy ("DOE").[6] Pet. Brief, at 26. The NRC is neither part of EPA nor the DOE. It would be improper for a Licensing Board to entertain a collateral attack upon any action or inaction of sister Federal agencies on a matter over which the Commission is totally devoid of any jurisdiction. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 NRC 1964, 1991 (1982). Any proposed contention asserting a dispute of law or fact with the EPA or DOE environmental justice strategies is inadmissible because it fails to raise an issue material to this NRC proceeding.

Importantly, the NRC has its own environmental justice strategy. *See* "Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions," 69 Fed. Reg. 52040 (Aug. 24, 2004). According to that policy, Executive Order ("E.O.") 12898 does not

---

6 Although the inclusion of the discussion on environmental justice within Section I.J seems at first blush to be due to a formatting error (*i.e.*, that environmental justice should be addressed under a new Section I.K), we treat the discussion as if it is part of the same section because the closing paragraph of that section references both the UN Declaration and environmental justice strategies.

establish new substantive or procedural requirements applicable to NRC regulatory or licensing activities. *Id.*, at 52046. Section 6–609 of the E.O. explicitly states that the E.O. does not create any new right or benefit. By its terms, the E.O. is "intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right [or] benefit ... enforceable at law." *Executive Order 12898*, 59 Fed. Reg. 7629, 7632–33 (Feb. 16, 1994). Courts addressing environmental justice issues have uniformly held that the E.O. does not create any new rights to judicial review. *See, e.g., Sur Contra La Contaminacion* v. *EPA,* 202 F.3d 443, 449-50 (1st Cir. 2000). Consequently, the Commission has determined — and Crow Butte agrees — that the E.O. itself "does not provide a legal basis for contentions to be admitted and litigated in NRC licensing proceedings." 69 Fed. Reg. at 52046.[7]

Petitioners also attempt to use the brief and the UN Resolution to "bootstrap" new arguments regarding consultation into the proceeding. For example, the petitioners argue that the NRC must engage in meaningful consultation "[u]nder the Trust Doctrine, and in accordance with the 1994 Executive Order and 2000 Executive Order, and guided by the UN Declaration." Pet. Brief, at 39. None of those reasons are sufficient to support an admissible contention, whether individually or as a group, because they apply to tribal interests, not those of individuals. Nor do petitioners raise a genuine dispute with a matter of law or fact regarding the Executive Orders or UN Declaration because those documents do not impose legally-enforceable obligations on the applicant or the NRC. Moreover, as discussed previously, all of those arguments are untimely with respect to this proceeding.

---

[7] *See also International Uranium Corp.* (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 8 (1997) (determining that petitioners may not file for a hearing using Executive Order 12898, when the case concerns itself with an amendment for a site that has already been licensed).

Similarly, petitioners' arguments regarding consultation with Mr. Whitewoman are untimely and, in any event, fail to demonstrate a litigable issue in this proceeding. Pet. Brief, at 40-43. Although the applicant's interactions with Mr. Whitewoman were discussed in the Environmental Report, the petitioners' brief introduces new information regarding those interactions without any justification or basis for their tardiness (Pet. Brief, at 42).[8] Also, as discussed previously, those interactions address issues beyond the opportunity for briefing provided by the Licensing Board, and, further, petitioners have no standing to assert the rights of third parties, such as the tribes, in this proceeding.

In addition to the critical infirmities discussed above, petitioners' arguments fail for other, more substantive reasons. Specifically, there is no legal requirement that the *applicant* consult with state or tribal authorities under the National Historic Preservation Act ("NHPA"), 16 U.S.C § 470. The requirement to consult applies only to federal agencies such as the NRC. Moreover, petitioners have not raised a genuine dispute as to a matter of law or fact with regard to consultation. Petitioners appear to be conflating two unrelated concepts regarding the discussions with Mr. Whitewoman. *See, e.g.*, Pet. Brief, at 43. The proposed contention regarding consultation goes only to *historic and cultural resources* and, specifically, to the Indian camp reported in the ER. *See* Petitioners' Corrected Reference Petition, at 21. Significantly, the North Trend Expansion project would not impact the Indian camp because the camp is located *outside of the assessment area*. The camp was reported in the ER simply

---

[8] During the prehearing conference, counsel for petitioners cited only the UN Declaration and treaties as a basis for requiring consultation with tribes regarding the historic sites. Tr. at 305. Counsel did not cite the NHPA as a basis for requiring consultation. The Board should not permit petitioners to interject new legal theories and arguments at this late date.

because it was identified as being near the project during an archaeological site search that was completed at the Archaeology Division of the Nebraska State Historical Society in July 2004 — that is, the site was reported based on a review of existing archeological records. *See* ER, at 3.8-1. Those records were not created or maintained by Crow Butte.

In contrast, the discussion with Mr. Whitewoman focused on *impacts to water resources*, not cultural or historic resources. Neither NEPA nor the NHPA require consultation with tribes on potential water resource impacts. Petitioners have pointed to no law that requires private entities, such as Crow Butte, to respond to or follow-up with every inquiry from the public. Impacts to water resources are instead addressed in the Environmental Report, and, later, in the NRC Staff's environmental review documents. Tribes will have the opportunity to comment on those impacts as part of the normal NEPA process. Thus, there is no dispute on genuine issue of law or fact because there is no requirement to consult with tribes on water resource issues.

IV. CONCLUSION

For these reasons, as well as those discussed in the NRC Staff's brief of February 22, 2008 and Crow Butte's brief of February 22, 2008, the Fort Laramie treaties and UN Declaration do not provide a basis for an admissible contention.

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 29th day of February 2008

February 29, 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 CONSOLIDATED RESPONSE TO BRIEFS 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 29th 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)

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

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

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

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

Harold S. Shepherd*
Center for Water Advocacy
90 West Center St.
Moab, UT 84532
(e-mail: waterlaw@uci.net)

Marc A. Ross
Rock the Earth
1536 Wynkoop Street
Suite B200
Denver, CO 80202

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

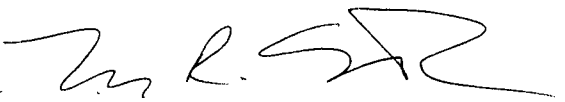
Debra White Plume*
P.O. Box 71
Manderson, SD 57756
(e-mail: LAKOTA1@gwtc.net)

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)

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

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

Elizabeth Maria Lorina*
Mario Gonzalez
Law Offices of Mario Gonzalez
522 7th Street, Suite 202
Rapid City, SD 57701
(e-mail: elorina@gnzlawfirm.com)



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

COUNSEL FOR CROW BUTTE
RESOURCES, INC.