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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
Before Administrative Judges:
Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of	Docket No. 40-8943 ASLBP No. 07-859-03-MLA-BD01
CROW BUTTE RESOURCES, INC. (In Situ Leach Facility, Crawford, NE)	February 29, 2008

PETITIONERS' RESPONSE TO
APPLICANT'S BRIEF REGARDING TREATIES, ETC.

Petitioners[1] hereby respectfully submit this Response to Applicant's Brief Regarding Treaties Etc, ("Applicant's Brief"), pursuant to Paragraph 6 of Judge Young's Order dated January 24, 2008.

INTRODUCTION

In light of the NRC's responsibilities under the Trust Doctrine, applicable Executive Orders (1994 and 2000) and the agency's own environmental justice policies, federal law requires the NRC, including the Board, to interpret the applicable statutes and regulations in the manner most favorable to the Indigenous Petitioners. "[T]he trust relationship between the United States and the Native American people" requires that the NRC give a "liberal construction" of any provisions of law, that are "for the benefit of Indian tribes." Petitioners' Memorandum of Law re: Indigenous Issues ("Petitioners' Brief") at 41. Further, the implication of the religious rights of the Indigenous Petitioners

[1] By email dated February 29, 2008, Bruce Ellison, Attorney for Petitioners Owe Aku and Debra White Plume, approved of this Memorandum and authorized the undersigned to file it on behalf of his clients as well as those represented by the undersigned.

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requires strict scrutiny of the NRC and Applicant's licensing activities and that such parties demonstrate a compelling interest and that the least restrictive means have been or will be used. Petitioners Brief at Sections I.F and I.G. This is the highest standard known to federal law.

RESPONSE

1. Treaty Rights May Be Asserted By Indigenous Petitioners. Applicant states that the Oglala Petitioners have made no showing that a violation of treaty rights is a violation to the Petitioners "rather than to the tribal signatories of the treaties." Applicant Brief at 5. First, the statement itself shows a lack of understanding and respect for tribal people. The "tribal signatories of the treaties" are long since deceased and their names are not mentioned unless absolutely necessary out of respect for the dead. Some of such signatories' descendants are involved in this matter such as Petitioner Debra White Plume and Joseph American Horse, Sr. Moreover, treaty rights may be asserted by a member of the Tribe in addition to the Tribe itself. See Puyallup Tribe, Inc. v. Dept. of Game, 433 US 165 (1977) (suit by tribe); Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969) (suit by tribal members); Petitioners' Brief at 11-12. In this case, Debra White Plume has asserted her treaty rights to farm and a necessary part thereof is the protection of groundwater from contamination caused by Applicant's activities; water that has been technically "restored" but not to baseline under relaxed NDEQ standards.

2. Zone of Interests Includes Respect for Indigenous Rights. Applicant argues that respect for the indigenous and federal rights of the Indigenous Petitioners does not fall within the "zone of interests" protected by the AEA and NEPA.

Applicant's Brief at 5. To the contrary, the express purpose of both the AEA and NEPA is the protection of the public. The AEA provides:

> **Section 2011. Congressional declaration of policy**
>
> Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that -
>
> (a) **the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare**, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and
>
> (b) **the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living**, and strengthen free competition in private enterprise.
>
> **Section 2012. Congressional Findings**
>
> (d) **The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public**.

Id. at Sections 2011; 2012 (emphasis added). Thus, the zone of interests protected by the AEA includes compliance with federal laws benefiting the Indigenous Petitioners and the Tribe. To develop, use and control atomic energy in violation of federal Indian law, treaties, the Winters doctrine, and applicable Executive Orders and polices of environmental justice would not make the maximum contribution to the general welfare as contemplated by Section 2011(a), and would not promote world peace, improve the general welfare or increase the standard of living as contemplated by Section 2011(b). Further, Petitioners submit that the regulation of nuclear source material in violation of such federal laws and policies would not be in the national interest as contemplated by

Section 2012(d). These are clearly "zones of interest" protected by the AEA.

In addition, the test for standing is not limited to the "zone of interests" under the AEA and NEPA but applies to the "zone of interests protected by the statutes governing NRC proceedings **such as** the [AEA and NEPA]." In Re Hydro Resources, Inc. (Crownpoint, NM), LBP-03-27, 58 NRC 408, 412 (2003) (emphasis added). Therefore, since the statutes referred to in Petitioners' Brief such as RFRA, AIRFA, NAGPRA, and the 1994 and 2000 Executive Orders, as well as applicable federal Indian and treaty law are "statutes governing NRC proceedings", they clearly fall within the "zone of interests" for purposes of standing. And if it should be argued that some of the foregoing federal laws are not technically "statutes" while in the nature of federal law, the Trust Doctrine requires a "liberal" interpretation in favor of the Indigenous Petitioners.

3. NEPA Extends to Cultural Resources; Ample Harm Has Been Alleged. Applicant admits that NEPA extends to cultural resources in addition to protecting environmental values.[2] Applicant's Brief at 5. Cultural resources under NEPA include local, pristine water supplies for traditional medicines and ceremonies like the "sweat

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[2] As held in Davis v. Morton, 469 F.2d 593 (D.C. Cir. 1972), "NEPA requires all federal agencies to consider the values of environmental preservation in their spheres of activities." Id, 469 F.2d at 569, quoting Calvert Cliff's Co-ord.Comm. v. United States Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971), the Court continued with an example relevant to the regulation of nuclear materials:

> 'NEPA, first of all makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted but compelled to take environmental values into account. Perhaps the greatest importance of NEPA is to require the Atomic Energy commission and other agencies to consider environmental issues just as they consider other matters with their mandates.' Id.

lodge," as described in the Affidavits of Grandmother Beatrice Long Visitor Holy Dance, Grandmother Rita Long Visitor Holy Dance, Grandmother Flordemayo, Grandmother Mona Ann Polacca, and Honor the Earth Executive Director, Winona LaDuke. Petitioners' Brief at 18-22 and Affidavits referred to therein. Accordingly, NEPA requires the NRC to concern itself with adverse effects of its actions on Indigenous rights and resources and take a "hard look" at the impacts of Applicant's proposed license amendment on the cultural and spiritual use of water by the Indigenous Petitioners.

4. Winters' Rights Omitted From Applicant's Brief. Applicant omits any discussion of the Winters rights, acknowledged by the NRC Staff (in NRC Brief at 10), to include water appurtenant to the Reservation. Such omission does not exempt Applicant, clothed in its NRC license, from compliance with federal law protecting supplies to the Reservation of sufficient quality and quantity of water to make it livable and productive and to allow for the continuation of traditional ways (including the practice of Lakota ceremonies like the "sweat lodge" which require local, pristine water). Accordingly, if as Petitioners' suggest, there are inter-relations and conductivity between the mined Chadron aquifer and the Arikaree and Brule aquifers upon which the Reservation relies, then there is a violation of the Winters rights.

Also, the depletion or contamination of water to a point that it interferes with such rights conveys standing. See City of Tacoma v. Federal Energy Regulatory Commission, 460 F.3d 53 (D.C. Cir. 2006) (right to fish guaranteed in 1855 Treaty of Point No Point to Skokomish Indian Tribe created an interest in licensing procedure for an off-reservation hydro-electric project which would affect water levels and silting in an on-reservation

lake used for fishing).

Therefore, especially in light of the Trust Doctrine and the Winters doctrine, the burden must shift to Applicant to show that its ISL mining activities in the Chadron aquifer and near the White River are not affecting the water that flows to and under the Reservation despite the substantial fracturing, faulting, and the White River Fault and White River Fold which would tend to indicate such inter-relations and conductivity. In any case, based on the foregoing, the Indigenous Petitioners have clearly demonstrated standing.

5. Applicant's Obligations Resulting From NRC Licensing of Its Activities.

Since Applicant may conduct its activities only with an NRC license, such licensing constitutes a 'federal action." This federal action by the United States is subject to the trust responsibility, treaty obligations and other federal law requirements discussed in Petitioners' Brief. If Applicant does not want to assume such obligations, it need not conduct its uranium mining activities. If the NRC takes action to license Applicant's activities, then the obligations owed to the Indigenous Petitioners and the Tribe are clearly implicated.

Applicant is required to prepare its Application to provide all necessary information for NEPA compliance, and shall have taken all necessary actions to prepare such necessary information so that it shall be true, complete and correct upon submission to the NRC. There are many specifics including, for example, the requirement under Section 51.45 concerning the irretrievable commitment of resources, such as water resources at issue in this case. However, the general rule that overlays all these specifics

is for Applicant to make full and accurate disclosures to enable NRC compliance with NEPA and AEA provisions applicable to the federal licensing action.

Similarly, Applicant should make complete and accurate disclosures to enable NRC compliance with the trust responsibility, treaty obligations of the United States, and consultations with BIA and the Tribe in accordance with the 1994 and 2000 Executive Orders and applicable agency environmental justice policies. Otherwise, as in this case, an applicant may take insufficient actions or make insufficient consultations part of their application to NRC.

Accordingly, it is essential that Applicant comply with the federal law obligations owed to the Indigenous Petitioners in order for the licensing action to be valid and not in violation of such applicable federal law (including the trust responsibility, treaty obligations. reserved rights and consultation rights). See Klamath Tribes v. U.S., 1996 WL 924509 (D. Or. 1996)(court rescinded permit issued to private company by US Forest Service because the Forest Service failed to engage in adequate consultation with the tribe and permit would impact significant tribal interests).[3]

6. Mischaracterization of Supplemental Affidavits. Footnote 1 of Applicant's Brief mischaracterizes Judge Young's Order dated December 20, 2007 by stating that the Order was limited to supplemental affidavits in support of representational standing. In fact, Paragraph 2 of the December 20th Order makes no reference and has no limitations on the affidavits as Applicant suggests. Further, it is inappropriate to make

[3] See, also, Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. (Am. Indian Law Training Program) 3065, 3071 (D. Mont. May 28, 1985) (mem.)(mineral leasing by federal government violated both NEPA and trust duty), remedy modified, No. 82-116-BLG (D. Mont. Oct. 8, 1985) (mem.), modified remedy rev'd, 851 F.2d 1152 (9th Cir. 1986).

informal requests to strike portions of filed documents in the footnotes to briefs in this manner as it prejudices the other parties' rights to brief the issue in response. Accordingly, all such informal requests should be disregarded as a violation of applicable procedures. See, e.g., 10 CFR Section 2.323. In any case, a motion would now be non-timely and disallowed under Section 323(a).

CONCLUSION

In the words of Oglala Lakota Grandmother Rita Long Visitor Holy Dance:

> [t]o the Lakota people, the nature of water has cultural and spiritual significance and value that is much greater than its use and value as a vital natural resource...we honor *mni* (water) for drinking, bathing, domestic, farming and other benign use and it has a value to use for such purposes....We honor *mni wiconi* which is the water of life that we drink as medicine during sacred prayer ceremonies like the ["sweat lodge"] (the place to renew life). This also means that there is a life and spirit in the water which we as indigenous people recognize and commune with and pray with and we know its healing power. Pristine water is our first home when we are in the womb. We are made of water. Water constitutes the blood [that] runs through our arteries and veins in our body in the same way as it runs through streams, springs and aquifers in the body of Mother Earth. Pristine water is the basis for the natural medicines that we as indigenous grandmothers learned from our mothers and grandmothers and that we need to pass on to our daughters and granddaughters. These medicines may not be made with adulterated water. It takes many generations to restore the natural qualities of water that has been adulterated sufficiently for it to be used again for natural medicines and sacred ceremonies. The use of pristine water for natural medicines and sacred ceremonies is a protected right. Affidavit of Oglala Lakota Grandmother Rita Long Visitor Holy Dance at Paragraphs 5-11.

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The foregoing constitutes Petitioners' Response to Applicant's Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' RESPONSE TO APPLICANT'S BRIEF RE: TREATIES, ETC.," in the above captioned proceeding have been served on the following persons by deposit in the United States Mail as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 29nd day of February, 2008:

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