

March 10, 2008 (3:00pm)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:

Ann Marshall Young, Chair  
Dr. Richard F. Cole  
Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.  
(In Situ Leach Facility, Crawford, NE)

Docket No. 40-8943  
ASLBP No. 07-859-03-MLA-BD01

February 29, 2008

**PETITIONERS' RESPONSE TO NRC BRIEF REGARDING TREATIES, ETC.**

Petitioners<sup>1</sup> hereby respectfully submit this Response to the NRC Brief Regarding Treaties Etc. ("NRC Brief"), pursuant to Paragraph 6 of Judge Young's Order dated January 24, 2008.

**INTRODUCTION**

The NRC Staff's narrow interpretations of the Winters doctrine and tribal consultation, treaty and hunting/fishing rights in this matter is contrary to the NRC's responsibilities under the Trust Doctrine, applicable Executive Orders (1994 and 2000) and the agency's own environmental justice policies. As discussed in Petitioners' Memorandum of Law re: Indigenous Issues ("Petitioners' Brief"), these principles of federal law require the NRC 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

<sup>1</sup> 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.

construction” of any provisions of law, that are “for the benefit of Indian tribes.”

Petitioners’ Brief at 41. Further, the implication of the religious rights of the Indigenous Petitioners 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.

Further, the trust duty’s higher standard of protection enhances NRC’s obligation under NEPA. For example, while NEPA applies largely to a “major federal action”, the trust obligation applies to any and all federal actions potentially impacting tribal interests. When tribal water rights are affected, therefore, the trust duty requires the NRC to ensure to the extent of its power that all available water is used to satisfy the tribe’s interest. 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).<sup>2</sup>

### RESPONSE

1. Treaty Rights May Be Asserted By Indigenous Petitioners. In Footnote 2 of the NRC’s Brief, the Staff asserts incorrectly that treaty rights may only be asserted by the Tribe itself (with a misguided reference to a land title case), and notes that the Oglala Sioux Tribe has not filed a petition in this matter. NRC Brief at 2. First, treaty rights may be asserted by a member of the Tribe in addition to the Tribe itself. See Puyallup

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<sup>2</sup> 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).

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.

Second, while it has not filed a petition in this matter, the Oglala Sioux Tribe has filed a persuasive *Amicus Curiae*. It is possible that the Oglala Sioux Tribe may seek intervention at a later date. However, the failure of the Oglala Sioux Tribe to litigate at this point should not be taken for a lack of interest or of rights but rather as a sign of courtesy and comity among Nations.

2. Indian Title. In Footnotes 2 and 6 of the NRC's Brief, the NRC Staff focuses on "Indian Title" which is a form of real estate interest not at issue in this case. NRC Brief at 4. The rights of the Indigenous Petitioners under federal law are described in Petitioners' Brief and include all rights that a sovereign nation would have except those rights that have been expressly given away by the Tribe through treaty or expressly negated by federal statute. See Petitioners' Brief at Section I.B.

3. Hunting Rights Not Extinguished. In Footnote 10 of the NRC's Brief, the NRC Staff argues that the Oglala Petitioners hunting rights were extinguished by Article 1 of the 1877 Act which purportedly extinguished hunting rights in Nebraska. We understand that the Tribe continues to dispute the validity of the agreement upon which the 1877 Act is predicated. In any case, even assuming *arguendo* that the 1877 Act

extinguished the right to hunt in Nebraska, the 1877 Act did nothing to extinguish the right to hunt wildlife roaming from Nebraska into the Pine Ridge Indian Reservation. Therefore, there is still an issue because wildlife (e.g., fish, birds, deer, etc.) can consume surface or ground water contaminated by Applicant's activities, and/or plants or animals that ingested such water, and roam onto the Reservation where they are hunted and consumed to the detriment of the Oglala Sioux people there.

4. Winters' Rights Affected; Standing Conveyed. The NRC staff admits that the Reservation has Winters rights to water appurtenant to the Reservation. NRC Brief at 10. 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 Tribe's Winters rights.

Therefore, the Trust Doctrine requires that the burden shift to the Applicant to show clearly and convincingly that its activities 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, absent such a showing by Applicant, the potential infringement of Winters rights indicated by the Application conveys standing to the Indigenous Petitioners. See City of Tacoma v. Federal Energy Regulatory Commission, 460 F.3d 53 (D.C. Cir. 2006); Petitioners' Brief at Section I.E.

## 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 *mini* (water) for drinking, bathing, domestic, farming and other benign use and it has a value to use for such purposes...We honor *mini 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.

The foregoing constitutes Petitioners' Response to the NRC Brief.

Respectfully submitted,



DAVID C. FRANKEL  
POB 3014, Pine Ridge, SD 57770  
Tel: 206-427-4747

          
/s/  
BRUCE ELLISON  
P.O. Box 2508  
Rapid City, SD 57709  
(605) 348-9458

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CERTIFICATE OF SERVICE

I hereby certify that copies "PETITIONERS' RESPONSE TO NRC 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 29<sup>th</sup> day of February, 2008:

Judge Ann Marshall Young, Chair \* \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: Ann.Young@nrc.gov

Judge Fred W. Oliver \* \*\*  
10433 Owen Brown Road  
Columbia, MD 21044  
E-mail: FWOLIVER@verizon.net

Judge Richard F. Cole \* \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Richard.Cole@nrc.gov

Mrs. Johanna Thibault \* \*\*  
Board Law Clerk  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: Johanna.Thibault@nrc.gov

Office of the Secretary \* \*\*  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-mail: Hearing.Docket@nrc.gov  
(original & 2 copies)

Office of Comm. App. Adjudication \* \*\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C 20555  
E-mail: OCAAMAIL.Resource@nrc.gov

Office of the General Counsel \*\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Andrea Z. Jones, Esq.  
[Andrea.Jones@nrc.gov](mailto:Andrea.Jones@nrc.gov)

Marcia J. Simon, Esq.  
[Marcia.Simon@nrc.gov](mailto:Marcia.Simon@nrc.gov)

Catherine Marco, Esq.  
[Catherine.Marco@nrc.gov](mailto:Catherine.Marco@nrc.gov)

Tyson R. Smith, Esq. \*\*  
Winston & Strawn LLP  
1700 K St. NW  
Washington, DC 20006  
E-Mail: [trsmith@winston.com](mailto:trsmith@winston.com)

Mark D. McGuire, Esq. \*\*  
McGuire and Norby  
605 South 14th Street, Suite 100  
Lincoln, NE 60508  
E-Mail: [mdmsjn@alltel.net](mailto:mdmsjn@alltel.net)

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

Debra White Plume \*\*  
P. O. Box 71  
Manderson, SD 57756  
E-mail: [LAKOTA1@gwtc.net](mailto:LAKOTA1@gwtc.net)

Thomas Kanatakeniate Cook \*\*  
1705 S. Maple Street  
Chadron, NE 69337  
E-mail: [tcook@indianyouth.org](mailto:tcook@indianyouth.org)

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

Crow Butte Resources, Inc. \*\*  
Attn: Stephen P. Collings  
141 Union Blvd., Suite 330  
Lakewood, CO 80228  
E-mail: [steve\\_collings@cameco.com](mailto:steve_collings@cameco.com)

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

Slim Buttes Ag. Dev. Corp. \*\*  
Attn: Joseph American Horse, Sr., President  
P.O. Box 941  
Pine Ridge SD 57770  
E-mail: [smbttsag@bbc.net](mailto:smbttsag@bbc.net)

Respectfully submitted,



David C. Frankel  
POB 3014, Pine Ridge, SD 57770  
Tel: 206-427-4747