

RAS B-17

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USNRC

March 10, 2008 (8:30am)

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March 10, 2008

Office of the Secretary  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

**RE: In the Matter of Crow Butte Resources, Inc. (License Amendment for the North Trend Expansion Project); Docket No. 40-8943-MLA; ASLBP #07-859-03-MLA-BD01**

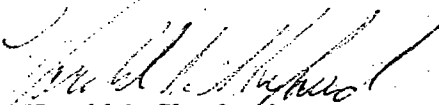
Dear Docketing and Service:

Please find an original and two copies of the following documents related to the above matter:

- 1) Reply in Support of Motion Of Center For Water Advocacy, Rock The Earth And Robert Lippman For Leave To File A Brief *Amicus Curiae*; and
- 2) Certification of Service.

Please contact me if you any questions regarding this filing.

Very Truly Yours,

  
Harold S. Shepherd  
Staff Attorney

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Secy-02

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

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

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

March 10, 2008

REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF *AMICUS*  
*CURIAE*

COMES NOW, The Center for Water Advocacy (CWA), Rock the Earth (RtE) and Robert Lippman, (Movants) through the undersigned as their duly authorized representatives files this combined Reply to the Nuclear Regulatory Commission's (NRC's) and Crow Butte Resources, Inc.'s (CBR's) Answer to Motion of Movants for leave to file briefs amicus curiae.

DISCUSSION

Movants participation in this matter is entirely proper and timely.

NRC claims that Movants "incorrectly cite 10 C.F.R. § 2.315(d) as their basis for filing.

In support of its claim NRC asserts:

Both motions incorrectly state that the Board took up *sua sponte* the issues of law relating to the Fort Laramie Treaties and the U.N. Declaration during the January 16 hearing in Chadron, Nebraska....Furthermore, CWA/RTE incorrectly states that the Board 'invited' amicus briefs, when the hearing transcript shows no support for that statement.

REPLY IN SUPPORT OF MOTION TO FILE AMICUS CURIEA

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NRC Answer, at 2. Similarly, both NRC and CBR argue that “[t]he Commission’s rules explicitly permit *amicus curiae* briefs only after the Commission grants a petition for review of a licensing board decision....” CBR Answer, at 2. *See also*, NRC Answer, at 2.

Section 2.315(d) states that “[i]f a matter is taken up by the Commission under [10 C.F.R.] § 2.341 or *sua sponte*, a person who is not a party may, in the discretion of the Commission, be permitted to file a brief ‘amicus curiae.’” 10 C.F.R. §2.3155(d).

“*Sua sponte*” is defined by Black’s Law Dictionary as of “his own its or his own will or motion; voluntarily; without prompting or suggestion.” This is precisely what occurred in this case. NRC’s claim on this point, in fact, is contradicted by the Applicant, itself, which provides that participation “by amicus curiae may be permitted in other circumstances ‘where special circumstances...warrant an exception to the [Commission’s rules].’” CBR Answer, at 2.

NRC and CBR’s conclusions that Movants’ brief is improper are contrary to the language of the January 16 transcript which expressly states:

JUDGE YOUNG: When we set deadlines and  
25 talk about dates at the end of the argument this may  
1 be something that if anyone wants to submit any case  
2 law on it, it just reminded me that it is an area of  
3 law that I'm not that familiar with but I have some  
4 acquaintance with. And so if there is any case law  
5 out there that's something that we can hear more from.  
6 hear more of.

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January 16, 2008 Hearing Transcript re: Indigenous Issues (HT), at 188-89. Judge Young

continued:

25 JUDGE YOUNG: Well, the mineral rights and  
1 the water rights I mean we all know that particularly  
2 with water rights in the west it can become very  
3 controversial issues. So I don't know what the law is  
4 on it but if there is any law on it it would be good  
5 for us to be aware of that.

HT, at 190.

As a result, NRC misrepresents the Board's regulations when it states that  
“[t]here are no NRC regulations that explicitly authorize amicus participation before a  
licensing board.” NRC Answer, at 2. Even, in the event that no such regulations exist, the  
NRC and Crow Butte fail to cite any regulation that prohibits the filing of such briefs and  
, in fact, none exist that would prohibit such participation by CWA or RtE.<sup>1</sup> This is  
particularly true since it was the Atomic Safety and Licensing Board (Board), itself, that  
requested the Briefs. As NRC correctly points out the Board has stated that, “although  
the rules do not explicitly authorize amicus briefs at the licensing board level, such briefs  
might still be granted in appropriate circumstances.” NRC Answer, at 2 *citing Public*  
*Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC*

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<sup>1</sup> This is illustrated by the fact that the best rational for rejecting the Amicus Briefs that CBR can offer is that they “we were able to uncover no instances where an amicus curiae was permitted to participate in an NRC proceeding in support of proposed contentions.” Crow Butte Answer, at 2.

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144, 150 (1987). Therefore, since briefing was specifically requested by Judge Young, *sua sponte*, Movants' brief amicus curiae was proper.

Likewise, Movants' brief was also timely. NRC maintains that "a motion for leave to file an amicus brief, like other motions, must comply with the Commission's rule for filing motions, 10 C.F.R. § 2.323. Under that rule, OST and CWA/RTE were required to submit their motions within 10 days of 'the occurrence or circumstance from which the motion arises.'" NRC Answer, at 2. This, however, is contrary to the express language of § 2.315(d) which states "Unless the Commission provides otherwise, the brief must be filed within the time allowed to the party whose position the brief will support." In this case, the Petitioners were directed to file their briefs on February 22, which was the same date Movants filed their proposed Amicus brief.

These filings were made pursuant to Judge Young's Order dated January 24, 2008 and her invitations during the January 16, 2008 Hearing in this matter to provide relevant legal authority and standards concerning the 1851 and 1868 Fort Laramie Treaties, **federal Indian law, the United Nations Declaration of Indigenous Rights** ("UN Declaration"), and applicable standards of consultation required when dealing with, or taking actions affecting the rights of, Indian tribes and their members, especially involving water. *See* HT, at 187 (re: treaty issues), at 190 (re: water rights in the West), at 307 (re: law related to consultation with tribes).

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Even in the event that the Board had not specified the deadline for the Petitioner's Brief (and, therefore, the *amicus curiae* briefs) in this matter, NRC, fails to state what the "occurrence or circumstance from which the motion arises" would be. This is because, in the case of an Amicus party, there is no such occurrence or circumstance for such briefs. Amicus briefs are not typically filed in response to a motion to dismiss, make more definite and certain or summary judgment or other standard motions, but rather, by their very nature, are filed at any time during the proceedings unless otherwise provided by regulation. In *Environment (Care) v. Deruyter Bros. Dairy*, 54 F.Supp.2d 974 (1984), for example, an irrigation district was permitted to file an amicus brief in a Clean Water Act citizen suit against a dairy, even though the petition to participate as *amicus curiae* was filed on the eve of summary judgment motions. The amicus brief was allowed since the district was in a position to provide unique information on the issue of whether particular drains and ditches constituted "waters of the United States." [page CITE??]. Therefore, since Movants' Amicus brief was filed at the direction of Judge Young and filed in conjunction with other briefs in this matter, Movants' Brief was timely.

NRC further claims that Movants "were required to contact other parties, including the NRC Staff, prior to filing the motions." NRC Answer, at 2. Similarly, CBR claims that "all motions must include a certification by the attorney of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and

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resolve the issues raised in the motion.” CBR Answer, at 2. Based on the fact, however, that the Board requested Movants’ Amicus Brief, it is clear that the rule cited by NRC and CBR regarding contacting other parties does not apply in this case. This is particularly true since NRC and CBR clearly expressed their objections to the filing of these Briefs at the January 18 hearing, which objections were overruled by the hearing examiner, and that contacting them to confer prior to filing the Amicus Brief would, therefore, have been futile. HT, at 190.

Both NRC and CBR also argue in their Answers that the scope of Movants’ Brief exceeds the matter in this case and should not be considered. Specifically, NRC argues that “[o]ther sections of the CWA/RTE brief impermissibly raise new issues in the proceedings.” NRC Answer, at 3-4. Similarly, CBR alleges that “instead of taking the proceedings, ‘as it finds it’, CWA attempts to introduce new legal theories and new documents to the existing record.” CBR Answer, at 3. Neither CBR nor NRC, however, provide any authority in the Board’s regulations governing the scope of *amicus curiae* briefs or any other law or regulation, that would required Movants to take the proceedings “as they find it” and prohibit Movants from including the topics discussed in their brief. In fact, an *amicus curiae* filing is intended to point out new arguments that the parties may not have raised or the deciding body may not have considered. Other courts have comprehensively addressed the issue of the substance of an *amicus curiae* brief. Amicus briefs are, for example, normally allowed when the *amicus* has unique

information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. *Community Ass'n*, 54 F.Supp.2d at 974. As a result, an amicus brief is authorized when the movant is in a position to provide unique information on an issue in which it has particular expertise. *Id.* Under most state jurisdictions the function of an amicus brief is generally to call the court's attention to law or to facts or circumstances that may have escaped consideration. *See e.g., Village of North Atlanta v. Cook*, 219 Ga. 316, 133 S. E. 2d 585 (1963).

Moreover, CBR maintains that Movants improperly raise "Section B (Violations of the Clean Water Act), Section C (climate change), Section E (environmental justice) and Section F (aquifer mixing) all raise issues unrelated to the treaties or the UN Declaration." CBR Answer, at 4. On the contrary, if any issues are related to the treaties in this case, then the issues of violation of federal environmental laws, the federal environmental justice policy and human health from aquifer contamination are directly on point. This is based on the fact that, as Movants' amicus brief attempts to explain, the basis for NRC's trust obligation to the Petitioners and the Oglala Tribe and, therefore, the agency's heightened duty to protect Petitioner's health and water rights, arises directly out of the Treaties of 1851 and 1868, as referenced in the amicus brief. As in this case, for example, when statutes and regulatory schemes authorize federal management of Indian Land or interests, these impose a fiduciary duty by the federal government to the Tribe.

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See. Mary C. Wood, Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited, 1994 Utah L. Rev. 1471, 1502, 1524.

In addition, Federal Courts have recognized the existence of a trust duty in statutes conferring executive authority over permit decisions by federal agencies, *Northwest Sea Farms Inc. v. United States Army Corps of Eng'rs*, 931 F.Supp. 1515, 1520 (W.D. Wash. 1996); *Muskleshoot Indian Tribe v. Hall*, 698 F. Supp. 1504, 1514 (W.D. Wash. 1988), and in management of mineral resources. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855, 857 (10<sup>th</sup> Cir. 1986) (en banc) (holding state mineral leasing statute created fiduciary relationship that supported tribal claim for equitable relief), *modified on other grounds*, 793 F.2d 1171 (10<sup>th</sup> Cir.). See also, *Assiniboine & Sioux Tirbe of the Fort Peck Indian Reservation v. Bd. Of Oil & Gas Conservation*, 792 F.2d 782, 794-96 (9th Cir. 1986)(identifying trust duty arising from Mineral Leasing Act of 1938, 25 U.S.C. §§ 396(a)-396(g) (1988)); *Enos v. United States*, 672 F. Supp. 1391, 1993-94 (D. Wyo. 1987)(finding that the United States waived sovereign immunity pursuant to the Tucker Act because of its fiduciary obligations regarding management of oil and gas leases on allotted Indian lands).

Neither NRC nor Crow Buttes have cited any transcript or document for their claim that the Board limited the amicus briefs to only tribal treaty rights and the U.N. Declaration of Indigenous Rights. In fact, in the context of the amicus brief issues, during the January 16 hearing, the attorneys for Petitioner thoroughly discussed the

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impacts of the expansion, not only on water rights but water quality, human health and environmental justice issues. In response to objections by the attorneys for CBR and NRC to including outside experts in the discussion, Petitioners' attorneys state:

[Frankel]:

1 There is also a complete failure to  
2 consider climate change, drought conditions, and that  
3 Chadron's water supply comes from the White River, and  
4 that the North Trend project drains into the White  
5 River. Which to us means that the community water  
6 supplies may be contaminated with radioactive waste  
7 from the CBR mine. And we are not alone because in  
8 Exhibit B it's clear that the NDEQ shares our concern  
9 and shared it, we were probably writing up the letter  
10 at the same exact time that they were writing up the  
11 letter.  
12 And the contamination of water quality,  
13 particularly as it pertains to water quality that  
14 affects the reservation is something that we  
15 specifically brought to the attention of everyone when  
16 we cited to Technical Report 2.4.1 which says that  
17 Harvey White Woman, Mr. Harvey White Woman of the  
18 Oglala Sioux Tribe called before the follow calls were  
19 begun to ask- what effect the proposed- project might  
20 have on water quality. And from what we can tell no  
21 one called him back.  
22 Environmental Justice, TR 2.3.3, as if  
23 completely inapplicable the company says no adverse  
24 implied if environmental impacts would occur to the  
25 population from the proposed project activities.  
1 There would be no disproportionate adverse impact upon  
2 the populations living below the poverty level.

HT, at 281-284.

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The strained nature of NRC's and CBR's arguments regarding the content of an *amicus curiae* briefing in these proceedings, is illustrated by their contradictory allegations regarding the content of Movants' brief. Immediately after arguing that Movants may not raise issues not already addressed by the parties, NRC, for example, states that Movants have not provided any "significant *new information*." NRC Answer, at 4 (emphasis added). Similarly, CBR alleges that "CWA's brief in many places, repeats – often word for word- *the arguments of the Petitioners*." CBR Answer, at 4 (emphasis added). It appears, therefore, that neither NRC nor CBR can decide whether they should be contesting the fact that, in their amicus brief, Movants are allegedly, providing new information or making the same arguments as the Petitioners.

Finally, NRC alleges that "unlike OST, CWA/RTE is not entitled to request an opportunity to participate under 10 C.F.R. § 2.315(c). CWA/RTE could have submitted a petition to intervene in this proceeding but did not do so." This, once again, is contrary to the Board's directive regarding Amicus Briefs, which did not require Movants to file a motion to intervene. *See HT*, at 187 & 190.

#### CONCLUSION

For the reasons explained above the Board should admit CWA/RtE's Motion to

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file an *Amicus Curiae* Brief.

Respectfully submitted this 10th Day of March,

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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

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

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

March 10, 2008

AMENDED CERTIFICATE OF SERVICE

I hereby certify that copies of the "MOTION OF CENTER FOR WATER ADVOCACY, ROCK THE EARTH AND ROBERT LIPPMAN FOR LEAVE TO FILE A REPLY IN SUPPORT OF BRIEF *AMICUS CURIAE*, AND *REPLY BRIEF OF AMICUS CURIAE*" 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 10<sup>TH</sup> day of March, 2008:

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