

March 3, 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
In-Situ Leach Facility, Crawford, Nebraska)	
)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

NRC STAFF'S ANSWER TO MOTIONS OF OGLALA SIOUX TRIBE AND
CENTER FOR WATER ADVOCACY ET AL. FOR LEAVE TO FILE BRIEFS AMICUS CURIAE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the NRC Staff ("Staff") hereby responds to the motions of the Oglala Sioux Tribe ("OST") and the Center for Water Advocacy, Rock the Earth, and Robert Lippman (collectively "CWA/RTE") for leave to file amicus curiae briefs in this proceeding.¹ For the reasons explained below, the Staff does not oppose OST's motion; however, the Staff respectfully requests that the Board deny CWA/RTE's motion.

¹ "Motion for Leave to File a Brief Amicus Curiae by Oglala Sioux Tribe" (Feb. 22, 2008) ("OST Motion"); "Motion for Leave to File a Brief Amicus Curiae by the Center for Water Advocacy, Rock the Earth, and Robert Lippman" (Feb. 22, 2008) ("CWA/RTE Motion"). Both motions were accompanied by amicus briefs. "Brief of Amicus Curiae [filed by Oglala Sioux Tribe]" (Feb. 22, 2008) ("OST Amicus Brief"); "Amicus Curiae Brief of Center for Water Advocacy, Rock the Earth and Robert Libbman [sic] in Support of Petitioners' Requests for Discretionary Intervention and Petitions for Hearing and/or to Intervene of Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council" (Feb. 22, 2008) ("CWA/RTE Amicus Brief").

DISCUSSION

Neither OST nor CWA/RTE filed their motions properly under the Commission's rules. Both movants incorrectly cite 10 C.F.R. § 2.315(d) as their basis for filing.² However, section 2.315(d), which 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," refers to appellate actions before the Commission. There are no NRC regulations that explicitly authorize amicus participation before a licensing board. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-862, 25 NRC 144, 150 (1987).

In *Seabrook*, the Atomic Safety and Licensing Appeal Board 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. *Id.* However, 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,"³ and were required to contact other parties, including the NRC Staff, prior to filing the motions. *Id.* at §§ 2.323(a) and (b). Neither OST nor CWA/RTE complied with these requirements.

² 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. OST Motion at 1, CWA/RTE Motion at 1. These issues were raised by Petitioners in their pleadings and at the January 16, 2008 hearing. Furthermore, CWA/RTE incorrectly states that the Board "invited" amicus briefs, when the hearing transcript shows no support for that statement. CWA/RTE Amicus Brief at 1, 3.

³ In this case, the occurrence or circumstance from which the motion arose was the public availability of the transcript from the January 16, 2008 hearing in Chadron, Nebraska. See OST Motion at 1; CWA/RTE Motion at 1. The transcript was publically available on ADAMS as of January 22, 2008. See "Transcript of Crow Butte Resources, Inc. Hearing, Wednesday, January 16, 2008, Chadron Nebraska" (ADAMS ML080220489). However, these motions were not filed until February 22, 2008.

Despite the procedural defects discussed above, the Staff acknowledges that, as a federally-recognized Indian tribe, OST is entitled to request a reasonable opportunity to participate in this proceeding under 10 C.F.R. § 2.315(c). Thus, because participation as an amicus would afford OST a reasonable opportunity to participate, the NRC Staff does not object to OST's motion.⁴

An amicus brief should be permitted when it would “supply a perspective that would materially aid the Licensing Board’s deliberations on the ... issues” to be resolved. See *Seabrook*, ALAB-862, 25 NRC at 150. Moreover, the Commission requires an amicus to “take[] the proceeding as he finds it.” *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-4, 45 NRC 95, 96 (1997). Thus, “[a]n amicus curiae can neither inject new issues into a proceeding nor alter the content of the record developed by the parties.” *Id.* In this case, the CWA/RTE brief does not meet either of those standards. The CWA/RTE brief consists largely of arguments already made in Petitioners’ treaty brief and prior pleadings. In fact, significant portions of the CWA/RTE brief are virtually identical to Petitioners’ treaty brief⁵ (“Pet. Mem.”) and Petitioners’ Exhibit A.⁶ See CWA/RTE Amicus Brief at 4 (Pet. Mem. at 38-39), 10-11 (Pet. Mem. at 36-38), 11-12 (Pet. Mem. at 26, 29), 21-22 (Pet. Mem. at 27-29), 23-24 (Petitioners’ Exhibit A). Other sections of the CWA/RTE brief impermissibly raise new issues in the

⁴ Because the Staff has already addressed the issues raised in the OST Amicus Brief, the Staff is not requesting an opportunity to respond to that brief. See “NRC Staff’s Brief on Law Related to the Fort Laramie Treaties and the United Nations’ Declaration of Rights of Indigenous Peoples” (Feb. 21, 2008) at 3-11; “NRC Staff’s Reply to Petitioners’ Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law” (Feb. 29, 2008) at 4-6, 9-12, 14-16, 20-21.

⁵ “Petitioners’ Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law” (Feb. 22, 2008).

⁶ Petitioners’ Exhibit A was an e-mail from Dr. Hannan Lagarry discussing geological characteristics of northwestern Nebraska. Both the Staff and Applicant have objected to this exhibit.

proceeding. See CWA/RTE Amicus Brief at 12-14 (discussing U.N. Working Group and Committee on Elimination of Racial Discrimination); 16-17 (discussing a paper on climate change), 18-19 (discussing Title VI of Civil Rights Act of 1964); 19-20 (discussing Nebraska environmental statutes). CWA/RTE has also attached four exhibits to its brief: a paper on climate change that is not part of the record (CWA/RTE Exhibit C), and three other documents already discussed in Petitioners' prior pleadings.⁷ When the information that is redundant, irrelevant, and outside the scope of a proper amicus brief is stripped from the CWA/RTE brief, there is no significant new information to warrant its inclusion in this proceeding.

Furthermore, 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. Consequently, the Board should deny CWA/RTE's motion. If, however, the Board grants CWA/RTE's motion, the Staff respectfully requests an opportunity to respond to the CWA/RTE brief.

CONCLUSION

For the reasons explained above, the NRC Staff does not oppose the motion of the Oglala Sioux Tribe to submit an amicus brief. However, the Staff opposes CWA/RTE's motion

⁷ CWA/RTE Exhibit A is "Uranium ISL Groundwater Data from Written Testimony of William P. Staub, Ph.D" (Jan. 9, 1999), referred to in Petitioners' treaty brief. Pet. Mem. at 38. CWA/RTE Exhibit B is an excerpt from a draft of NUREG/CR-6870, *Consideration of Geochemical Issues in Groundwater Restoration at Uranium In-Situ Leach Mining Facilities: Draft Report for Comment* (June, 2005), consisting of the abstract, foreword, table of contents, and part of Chapter 1. This document was also referred to in Petitioners' treaty brief. Pet. Mem. at 37-38. CWA/RTE Exhibit C is a computer analysis from a climate change study that is not part of the record of this proceeding. CWA/RTE Exhibit D is an abstract from a paper by Lagarry et al. which was referred to in a prior pleading and an affidavit. "Reply [of Petitioners Thomas Cook, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council] to NRC Staff Response" (Dec. 28, 2007) at 11; Affidavit of Bruce McIntosh at ¶ 6 (Dec. 28, 2007).

and respectfully requests that the Board deny their request. In the event that the Board grants CWA/RTE's request, the Staff requests an opportunity to respond to their brief.

Respectfully submitted,

/RA by Marcia J. Simon/

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Marcia J. Simon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 3rd day of March, 2008

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO MOTIONS OF OGLALA SIOUX TRIBE AND CENTER FOR WATER ADVOCACY ET AL. FOR LEAVE TO FILE BRIEFS AMICUS CURIAE" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 3rd day of March, 2008:

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