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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	Docket No. 40-8943
	ASLBP No. 08-867-02-OLA-BD01
CROW BUTTE RESOURCES, INC.	
(In Situ Leach Facility, Crawford, NE)	December 10, 2008

PETITIONER'S ELECTION TO PARTICIPATE AND NOTICE OF APPEAL

Pursuant to the Board's Order of November 21, 2008, the Oglala Delegation elects to participate in these proceedings as an interested local government entity in accordance with 10 C.F.R. § 2.315(c). The Oglala Delegation appoints Chief Oliver Red Cloud as its designated representative and retains Thomas J. Ballanco as counsel. The Oglala Delegation will participate in all the admitted contentions of both the Oglala Sioux Tribe and the Consolidated Petitioners, and if any of the contentions that have been denied by the Board's order are subsequently admitted, the Oglala Delegation will participate in those as well.

While the Oglala Delegation makes the afore-mentioned election and respectfully thanks the Board for allowing its inclusion in these proceedings, it respectfully submits this notice of appeal regarding the denial of its contention regarding the use of water

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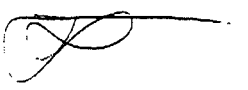
resources by Applicant and further, it must take issue with the Board's Order as it relates to the Treaties entered between the United States and the Great Sioux Nation.

Dated: December 10, 2008

Respectfully Submitted,



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Thomas J. Ballanco

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TABLE OF AUTHORITIES

Cases

Miscellaneous

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PETITIONER'S BRIEF IN SUPPORT OF APPEAL

ADMISSION OF CONTENTION REGARDING CONSUMPTION AND CONTAMINATION OF WATER BY APPLICANT

As regards the Applicant Crow Butte Resource's characterization of its water use, the Oglala Delegation reiterates its contention that this "water use" actually amounts to a permanent taking of water resources that the United States may one day deem belong to the Lakota nation. While the licensed flow-rate within the aquifer being mined for uranium involves water being re-circulated through the aquifer using the ISL process, there is also an annual bleed of 1-2% of the annual flow that is subsequently injected into a deep storage aquifer.

The operation of nuclear power plants uses more water than any other form of electricity generation, requiring from 500,000 to over 1 million gallons of water per

minute for cooling purposes. [David Lochbaum, Director, Nuclear Safety Project, Union of Concerned Scientists, *Issue Brief: Got Water*, 12/04/07.] However, unlike the water that is used in ISL mining at the Crow Butte facility, this water remains in the biosphere. That is, even though it carries heat the water remains available to the Earth's ecosystems that rely on water for sustenance.

Most of the water that is used by the Crow Butte facility for ISL mining remains in the biosphere, however it is rendered permanently unusable for many forms of ecosystem support, most notably for human consumption. In addition to the water that is used pursuant to the approved flow-rate, during the site visit, Crow Butte Resources acknowledged that 1-2% of its annual flow (17 – 50 million gallons of water), or about the amount equal to one circular sprinkler in a farmer's field, is injected as super-concentrated waste into a deep storage aquifer. This water is effectively removed from the biosphere due not only to the contaminants, but by it's physical injection in a deep storage well.

Undertaking such water-expensive activities as ISL mining and nuclear power generation with one's own water is reckless and ill-advised in this era of drought and diminishing water resources. Undertaking such activities with water that the United States admits was stolen from the Lakota nation is unconscionable. If and when the illegal taking of the Lakota treaty territory is recognized and appropriately reversed, what good will this water be then?

The Oglala Delegation respectfully reiterates its request for standing specifically to address the extreme consumption and contamination of water resources in Lakota treaty territory.

REJECTION OF UNITED STATES' ASSERTION OF "PLENARY POWER"

While the Oglala Delegation acknowledges that as an agency of the United States government, the Nuclear Regulatory Commission is bound by the rulings of the U.S. Supreme Court, further discussion will demonstrate to exactly what the NRC is bound. As stated in its initial filing, the Oglala Delegation will continue to address the NRC in its role as an agent of the United States.

During the course of its short history, the United States has denied rights to women because of their gender, to persons of African descent because of their race and to Japanese and Chinese, among others because of their ethnicity. Through legislation, constitutional amendment, litigation and warfare, each of these situations has been remedied to one degree or another. One glaring exception is the denial of the rights of the continent's first peoples based on racial and religious discrimination.

For over a century and a half, the United States and its multitudinous agents have claimed a "trust relationship" and a "guardian-ward" relationship with the various indigenous nations that were earlier identified as living independently on this continent for many thousands of years prior to European arrival. The notion and language of the "trust" relationship was constructed by a series of United States Supreme Court cases. *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

Such "trust" terminology seemingly provided the United States with a rationale for assuming governmental authority over Indian nations, and that rationale has served as the means of violating every treaty the United States entered with an Indian nation, which in turn served as the basis for passing such legislation as the General Allotment Act of 1877, the Major Crimes Act, the Indian Reorganization Act (1934), the Federal Enclaves Act and every other law unilaterally passed by the United States ostensibly for the good of the Indian people. Meanwhile the liberty, property, and independent sovereignty of the various Indian nations were slowly being eroded, and the United States was arrogating to itself their sovereignty, power and property.

The so-called "Right of Christian Discovery" was well explained in 1835 by Justice John Catron, who was later appointed by President Andrew Jackson to the U.S. Supreme Court. In State v. Foreman, 16 Tenn. (8 Yer.) 256, 277 (1835), Justice Catron declared:

> We maintain, that the principle declared in the fifteenth Century as the law of Christendom, that discovery gave title to assume sovereignty over, and to govern the unconverted natives of Africa, Asia, and North and South America, has been recognized as a part of the national law [Law of Nations],for nearly four centuries, and that it is so recognized by every Christian power, in its political department, and its judicial....

State v. Foreman, 16 Tenn. (8 Yer.) 256, 277 (1835). Christian "discovery" of non-Christian lands, said Catron, gave the "discoverers" a title *to assume sovereignty over* the unconverted natives, and to put them under Christian rule. Id. "Our claim," said Catron, is based on "the right to coerce obedience." Id. Given that Catron said the principle he had identified was recognized by "every Christian power," and that it was applied to natives who were "unconverted" to Christianity, it is clear that Catron was referring to a

religiously based claim *by Christians* of a "right" to coerce *non-Christians* into obedience to Christian European rule. Justice Catron insisted that this religiously based principle, which he said was traced back to Catholic papal law and to Catholic papal decrees in the fifteenth century, had been incorporated into U.S. law by the U.S. Supreme Court in its 1823 ruling Johnson v. M'Intosh, widely regarded as the conceptual starting point of federal Indian law[1]. Id., Johnson, *supra.*

The Johnson case provides the justification for the claim that the United States acceded to the claims of dominion by its European predecessors in interest on this continent. However the conceptual basis of Johnson cannot escape the Christian religious underpinnings of the European claims of "dominion" the United States was inheriting. In the Johnson ruling, Chief Justice Marshall said that the rights of Indians "to complete sovereignty as independent nations were necessarily diminished...by the original fundamental principle that [Christian] discovery gave title to those who made it." Johnson, at 574. The European "right of discovery" was based on the directives of medieval Popes and Kings as Marshall describes:

> No one of the powers of Europe gave its full assent to this principle [of discovery] more unequivocally than England. The documents upon this subject are ample and complete. So early as the year 1496, her monarch

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[1] It is noteworthy to mention that this seminal federal Indian law case was a sham from the beginning. The lands alleged to be in controversy in the case were not located within fifty miles of each other. Even allowing for the basic surveying techniques in use at the time, there is no plausible way the parties could have believed there was an actual controversy regarding their claims. *See* Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 Law & History Review 67 (2001), Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of Amerindian Lands*, 148 U.Penn. Law Rev. 1065 (2000).

> granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the king of England. To this discovery the English trace their title...We perceive a complete recognition of the principle [of discovery] which has been mentioned. The right of discovery given by this commission is confined to countries "then unknown to Christian people"; and of these countries Cabot was empowered to take possession in the name of the king of England. Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and at the same time admitting the prior title of any Christian people who may have made a previous discovery.

Johnson, at 576-77. Thus Christian Europeans asserted "ultimate dominion" over the "discovered" lands "to be in themselves," and that the Indians, "who were heathens" had a mere right of "occupancy." Id. at 574.

This is the conceptual basis for the "law of discovery" upon which the Court based its decision and thus provided the conceptual framework for all future Indian law cases and legislation. *See* Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: the Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power*, XX N.Y.U. Rev. of Law & Social Change 303 (1993). The rationale underlying the Johnson ruling, indeed, the substance of the ruling itself is tied to property distinctions based on religion. Ergo the entire body of federal Indian law that evolved there from, including the Supreme Court rulings and Congressional Acts, is equally tied.

Indian rights to complete sovereignty, as independent nations, could not have been, and were not, diminished by "discovery." Their rights as independent nations certainly could not have been diminished by a "discovery" that never occurred. Given that the lands of "the Americas" were already well known to the thousands of nations and millions of peoples already inhabiting them, and removing any distinctions based on

invalid religious discrimination, the Europeans did not "discover" the lands of the Americas, they merely arrived in this Western hemisphere.

It is only by ignoring the original independence of the Lakota nation, and by relying upon this ancient religious and racially based distinction between "Christian people" and "natives who were heathens," that the United States and its agents claim jurisdiction over the land and resources that is the subject of this proceeding.

The United States' use of the so-called federal "trust" relationship, "guardian-ward" relationship, and congressional assertion of "plenary power," to assume jurisdiction over the Lakota nation and this Treaty land, is an illegitimate and invalid extension of the "doctrine of Christian discovery and dominion" which is predicated on medieval religious distinctions that have no place in a free and egalitarian society premised on a separation between church and state. Continued assertion of such "doctrines" and "well-settled" principles by the United States government merely perpetuates five centuries of oppression of the original inhabitants of this land by the well-armed European and American colonizers.

Without the fraud that is the "doctrine of discovery," the United States is left with no source for its jurisdiction other than the barrels of the guns it has been all too willing to use against Lakota People.

Elsewhere in the Johnson ruling, Chief Justice Marshall said, "no matter how extravagant the pretension of converting the [Christian] discovery of an inhabited [heathen] country into conquest may appear, if it has been asserted in the first instance and afterwards maintained...it may perhaps be supported by reason, and cannot be questioned by courts of justice." Johnson at 591.

As disturbing and disrupting to federal jurisprudence as it may be, Chief Justice Marshall was wrong.

The addition of hundreds of years makes injustice more egregious, not less. Without its doctrines of religious discrimination or violence, the United States is left without a source of jurisdiction over the land and resources at issue in this case. The United States can choose to continue to construct semantic walls to try to conceal this most egregious crime against humanity, but to what ends?

By failing to acknowledge the reality of its history, the United States continues its centuries long attempt to impose its worldview upon the other nations that share this continent. Each attempt to ignore the native nations that were here first continues the genocide, both actual and cultural, that began with first contact. Each time the United States speaks of "trust relationship" and "plenary power" it is attempting to deny the Lakota Nation its sovereignty and perpetuating the United States' own culture of coercion and violence.

Senator Richard F. Pettigrew of South Dakota spoke out against the conquest of other peoples by American imperialism in the late nineteenth century by quoting President Abraham Lincoln, "Those who deny freedom to others deserve it not for themselves, and under the rule of a just God can not long retain it." Senator Pettigrew further wrote of Lincoln's statement:

> I believe this is true. I believe the reflex action upon our own people of the conquest of other peoples and their governments, against their will, will gradually undermine free institutions in this country and result in the destruction of the Republic. Governments are instituted, not bestowed, and therefore derive their just powers from the consent of the governed.

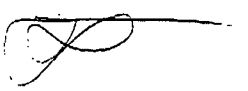
Richard F. Pettigrew, *The Course of Empire, an offical record*, New York: Boni & Liveright (1922). America cannot out run its past, and the quickening pace of time only hastens its approach.

The Lakota nation survived the trial of its dark times. It is the United States' survival that is now being put to the test. Two hundred years is not very long for a nation. Whether the United States survives the test of the millennia, like the tiospaye of the Lakota nation, represented here by the Oglala Delegation, depends not on how it charts its course for the future, the survival of the United States is linked to how well it remedies the mistakes of its past. A nation built on injustice cannot stand the test of time.

While the NRC may be bound by the rulings of the U.S. Supreme Court, the Oglala Delegation submits that those rulings are only changed when that court is presented with a genuine controversy. The Oglala Delegation knows that some day, some official arm or agency of the United States will take the first step towards remedying the mistakes of its past. The Oglala Delegation respectfully urges the Commission to take that step.

Dated: December 10, 2008

Respectfully Submitted,



Thomas J. Ballanco
Attorney for Petitioner

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CROW BUTTE RESOURCES, INC.
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December 10, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies of **PETITIONER OGLALA DELEGATION'S NOTICE OF APPEAL AND BRIEF IN SUPPORT OF APPEAL** in the above captioned proceeding has been served on the following persons by electronic mail on this 10th day of December, 2008:

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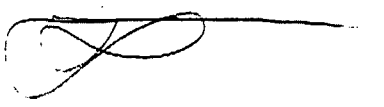

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Attorney for Petitioner

Hearing Docket

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Subject: Notice of Appeal of LBP-08-24 - Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01
Attachments: DelegationAppeal.pdf; DelegationAppealCOS.pdf

Greetings,

Attached please find the Oglala Delegation's Election to participate as a local government entity, along with it's Notice of Appeal, Brief in Support and Certificate of Service. Please let me know if anyone is unable to open the attachments or otherwise failed to receive service. Thank you, Tom Ballanco

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08-867-02-OLA-BD01
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