

# Official Transcript of Proceedings

## NUCLEAR REGULATORY COMMISSION

Title: Crow Butte Resources, Inc.  
Pre-hearing Conference

Docket Number: 40-8943; ASLBP No. 08-867-OLA-BD01

Location: (telephone conference)

Date: Monday, December 15, 2008

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD  
PREHEARING CONFERENCE

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IN THE MATTER OF )  
CROW BUTTE RESOURCES, INC. ) Docket No.  
 ) 40-8943  
(License Renewal for the ) ASLBP No.  
In Situ Leach Facility, ) 08-867-OLA-BD01  
Crawford, Nebraska) )  

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Monday,  
December 15, 2008

Via teleconference

The above-entitled matter came on for hearing,  
pursuant to notice, at 1:00 p.m.

BEFORE:

MICHAEL M. GIBSON, Chairman  
RICHARD F. COLE, Administrative Judge  
BRIAN K. HAJEK, Administrative Judge

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15 ALSO PRESENT:

16 ALAN ROSENTHAL, Administrative Judge,

17 Advisor to the Board

18 BUFFALO BRUCE MACINTOSH

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## P-R-O-C-E-E-D-I-N-G-S

(1:03 p.m.)

1  
2  
3 CHAIRMAN GIBSON: Hello, this is Judge  
4 Gibson. Along with me is Judge Cole and Judge  
5 Rosenthal. Judge Hajek, are you on the line?

6 JUDGE HAJEK: Yes I am.

7 CHAIRMAN GIBSON: Okay. Is -- I guess  
8 what we ought to do, first of all, is have  
9 announcements. Let's start with the Counsel for the  
10 Applicant, are you on the line?

11 MR. SMITH: Yes, this is Tyson Smith,  
12 Counsel for the Applicant, I am here, as is Mark  
13 McGuire is on the phone as well.

14 MR. MCGUIRE: Yes.

15 CHAIRMAN GIBSON: Good too. By the way,  
16 is our court reporter on the line? Oh, that's not  
17 good.

18 COURT REPORTER: Yes sir, I am.

19 CHAIRMAN GIBSON: Court reporter on the  
20 line?

21 COURT REPORTER: I am.

22 CHAIRMAN GIBSON: Okay good. Okay.  
23 Counsel for NRC, are you on the line?

24 MR. KLUKAN: Yes, Your Honor, this is  
25 Brett Klukan, for the NRC Staff. I have along with me

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1 Catherine Marco.

2 CHAIRMAN GIBSON: Okay. Consolidated  
3 petitioners, are you there?

4 MR. FRANKEL: Yes, Judge, David Frankel  
5 here, and I have with me Shane Robinson.

6 CHAIRMAN GIBSON: Okay. Counsel for the  
7 Tribe, are you there?

8 MS. LORINA: Yes, Elizabeth Lorina for the  
9 Oglala Sioux Tribe.

10 CHAIRMAN GIBSON: And the Delegation  
11 Treaty Council, are you present?

12 Okay. Noone is present for the Delegation  
13 Treaty Council.

14 Okay. Is there anyone else on the line?

15 Okay. Good. Well, I appreciate you all  
16 getting on the phone with us here. We have a couple  
17 of things that we ought to try to address. I think  
18 the first thing I would like to address is the  
19 question of the status of the environmental and the  
20 safety process.

21 So, Counsel for the NRC Staff, could you  
22 give us some idea of where we are on each of those,  
23 and what your estimating for time, how much time it's  
24 going to take before they're completed?

25 Hello?

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1 MR. KLUKAN: Hi, this is, Your Honor, this  
2 is Brett Klukan for the NRC Staff. Both reviews are  
3 still underway.

4 Our project manager isn't here, so I can't  
5 state the actual time for completion. But he should  
6 be arriving shortly. So I can give you a better answer  
7 when he actually arrives.

8 But I know that both are still, both  
9 reviews, the safety and the environmental review, for  
10 the renewal application are still ongoing.

11 CHAIRMAN GIBSON: Okay. And without the  
12 project manager, you're unable to tell us anything  
13 more --

14 MR. KLUKAN: My ballpark would be this  
15 coming December. Not this December of course, but the  
16 following December would be the completion for both.

17 CHAIRMAN GIBSON: Okay. Is -- Will one be  
18 completed before the other?

19 MR. KLUKAN: As far as I'm aware, Your  
20 Honor, the safety review will be completed before the  
21 environmental review. So that final date would be for  
22 the environmental review.

23 CHAIRMAN GIBSON: Okay, and -- Hello, who  
24 just joined us?

25 MR. BRUCE: Buffalo Bruce.

1 MR. FRANKEL: Bruce, as one of the  
2 petitioners, you have your counsels on the phone, I'm  
3 glad you're here. Would you be able to join us and  
4 listen in? I don't think you're expected to --

5 MR. BRUCE: I understand, yes.

6 MR. FRANKEL: Okay. Is that okay with  
7 everybody?

8 CHAIRMAN GIBSON: Fine. I just want to  
9 make sure I understand, when will the safety process,  
10 you don't know when the safety process is likely to be  
11 completed, I take it?

12 MR. KLUKAN: Your Honor, the only thing of  
13 which I'm aware, in speaking briefly with our project  
14 manager is that the final thing that will be finished,  
15 or the last item for this, will be the environmental  
16 review will be completed. And that's going to be in  
17 December of next year, ballpark-wise.

18 CHAIRMAN GIBSON: Okay.

19 MR. KLUKAN: The safety review will be  
20 completed sometime before that. Again, we haven't  
21 really spoken about that, given what's been in play so  
22 far before the omission of this last contention,  
23 contention having environmental issues. And so, I  
24 can't really speak, or even ballpark, when the safety  
25 review will be completed.

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1 JUDGE ROSENTHAL: Is it the anticipation  
2 of the Staff that it's going to issue a EIS? Or is  
3 that still up in the air? Because I would think if  
4 the contemplation was that they would be issuing a  
5 FONSI, it would take place a lot earlier than next  
6 December.

7 This is Alan Rosenthal. I think that  
8 probably everybody for the benefit of the reporter  
9 should identify themselves when they speak.

10 How about that? Is it the anticipation of  
11 the Staff at this point, or do they not know whether  
12 they're going to be issuing EIS?

13 MR. KLUKAN: Your Honor, this is Brett  
14 Klukan for the NRC Staff, the estimated date for the  
15 completion of our reports will be the Summer, the Fall  
16 for the safety. And I was correct, ballpark-wise  
17 about a year out, so next December we will complete  
18 with the environment review.

19 JUDGE ROSENTHAL: But you don't know at  
20 this point whether it's going to be a full dress EIS?

21 MR. KLUKAN: It will be at least, be an  
22 environmental assessment Your Honor, this is again  
23 Brett Klukan for the NRC Staff --

24 JUDGE ROSENTHAL: Of course it has to be  
25 at least an environment assessment.

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1 MR. KLUKAN: But, to be honest Your Honor,  
2 we don't know at this time, given this review hasn't  
3 been completed, whether it is going to be a full EIS.

4 JUDGE ROSENTHAL: Now, is, is it not the  
5 case that the Staff is doing a generic EIS for this  
6 kind of operation?

7 MR. KLUKAN: That is correct, Your Honor,  
8 again this is Brett Klukan, but that will not cover  
9 this proceeding. We are doing, or the Staff or the  
10 Commission is in review of a draft generic  
11 environmental impact statement, but that will not  
12 impact the environmental review for the license  
13 renewal proceeding pending before us.

14 JUDGE ROSENTHAL: All right, this is Alan  
15 Rosenthal again. Then, just so I'm clear on this,  
16 it's likely to be another year before the  
17 environmental review is completed. And at this point  
18 it's up in the air as to whether you'll end up with a  
19 full EIS or with simply an assessment that ends in a  
20 FONSI. Is that correct?

21 MR. KLUKAN: That is correct, Your Honor.  
22 This is, again, Brett Klukan.

23 JUDGE ROSENTHAL: Thank you.

24 CHAIRMAN GIBSON: Okay. Thank you Mr.  
25 Klukan. Appreciate that. If that's the case, then I

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1 guess we'd be looking at, if you weren't completed  
2 with that until December of 2009, we would be looking  
3 at having an evidentiary hearing on everything in  
4 probably May of 2010. Is that right? We're supposed  
5 to have it within 175 days of the date that the --

6 MR. KLUKAN: This is Brett Klukan for the  
7 NRC Staff. That, that would seem a correct estimate  
8 of when the, the evidentiary hearing would occur. If  
9 we did complete our environmental review in December  
10 of 2009.

11 CHAIRMAN GIBSON: Right. Now, let me ask  
12 you this. Do you know if there is any question about  
13 whether you're going to have the environmental review  
14 completed by December 2009, or whether it might be  
15 later than December of 2009?

16 MR. KLUKAN: Your Honor, again this  
17 December 2009 figure is a ballpark, because we are  
18 still early on in our environment review. The Staff,  
19 of course, and again this is Brett Klukan, would avail  
20 the Board of, I mean, any changes to the schedule that  
21 were occur in any time we were to more finalize these  
22 dates. But at this time, December 2009 is a ballpark.  
23 It could come after that, it could come before that.  
24 But December 2009 is our best estimate of when the  
25 environmental review will most likely be finished.

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1 JUDGE ROSENTHAL: All right, this is Alan  
2 Rosenthal again. I take it that the Staff will notify  
3 the Board promptly if there is any significant  
4 slippage in that current ballpark estimate of December  
5 '09?

6 MR. KLUKAN: This is Brett Klukan, that,  
7 of course, Your Honor, the Staff would notify the  
8 Board promptly if that schedule were to change in  
9 either direction.

10 CHAIRMAN GIBSON: Yes, I think what might  
11 be, what might be best would be to have maybe a  
12 monthly update, just be a one page document that you  
13 could provide all the parties, counsel, to let us know  
14 where we are in this process, and what the anticipated  
15 date is going to be.

16 MR. KLUKAN: This is Brett Klukan. So, I  
17 think the Staff would be more than comfortable, Your  
18 Honor, providing a monthly status report of the type  
19 you just envisioned to all the parties, starting,  
20 let's say, in January of this coming year.

21 CHAIRMAN GIBSON: That would be, that  
22 would be splendid.

23 Okay. Well, we are going to have, we have  
24 a stay in place for the disclosures pending the  
25 briefing on the foreign ownership issues. And I'm

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1 curious I guess whether it might make sense to  
2 consider having perhaps two or perhaps even three  
3 hearings, because we're getting the foreign ownership  
4 piece together now. Most of it is going to be legal  
5 briefing. We are going to have presumably the non-  
6 environmental issues addressed perhaps by the summer.  
7 And then the environmental issues would not be  
8 addressed until, you know, much later in the year.

9 Let me start with Counsel for the  
10 Applicant. Do you have a view about whether that  
11 would be a good way to proceed or not?

12 MR. SMITH: I think that's, that's a fine  
13 way to proceed. I mean, I guess my only comment would  
14 be that the one safety related issues that are  
15 admitted tie pretty closely to some of the  
16 environmental issues. And I can't say for certain  
17 that those will be resolved. I mean, that might be  
18 something that you have to check with the NRC Staff  
19 on. But other than that, I have no problem  
20 bifurcating the proceeding and holding hearings on  
21 issues as soon as they're ready to be dispositioned.

22 CHAIRMAN GIBSON: Yes, certainly, I think  
23 the arsenic contention that was just admitted is, you  
24 know, as we're all aware, is very closely related to  
25 some of the environmental issues. Okay. But as far

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1 as the, at least two, where we would, might have, you  
2 know, foreign ownership in one piece, and then -- I  
3 don't know. Let me ask you this --

4 MR. SMITH: Maybe I could, I could maybe  
5 advance this --

6 CHAIRMAN GIBSON: Please.

7 MR. SMITH: -- just a little bit.

8 CHAIRMAN GIBSON: Please.

9 MR. SMITH: One of the items we were going  
10 to do in response to your decision admitting the  
11 contention was, we've amended the application to  
12 revise the section discussing the ownership of Crow  
13 Butte, to add some discussion of its foreign parent.  
14 So our plan at present is to, and I want to discuss  
15 this on the call, would be to submit a summary  
16 disposition motion on this January 21<sup>st</sup> date, and that  
17 would include obviously our revision to the  
18 application that addresses the alleged omission.

19 CHAIRMAN GIBSON: Okay.

20 MR. SMITH: So that would, I think, take  
21 care of that one. And, you know, the other ones, we  
22 would also have a legal brief to you at that time,  
23 and, we have no problem moving forward on any of those  
24 issues.

25 CHAIRMAN GIBSON: And when you're talking

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1 about summary disposition, I take it you're talking  
2 about the disclosure?

3 MR. SMITH: Correct. The miscellaneous  
4 contention G, which was admitted as an omission from  
5 the application. Allegedly we failed to state that we  
6 had foreign parents.

7 CHAIRMAN GIBSON: Okay. Okay, I  
8 appreciate your providing us with that additional  
9 information.

10 Recognizing that's sort of how you were  
11 planning on proceeding with respect to the foreign  
12 ownership piece, let me ask you now, with respect to  
13 the remaining contentions, it sounds like there are,  
14 there's going to be a group of contentions related to  
15 the environmental report, which are at least going to  
16 control when we can address the environmental  
17 contentions as well as probably at least one of the  
18 safety contentions.

19 Do you have a view about whether there is  
20 a cluster of other contentions that are not tied to  
21 those environmental contentions that could be  
22 addressed in a separate proceeding?

23 Counsel for the Applicant?

24 MR. SMITH: I'm sorry, I was thinking  
25 here.

1 CHAIRMAN GIBSON: Okay. That's okay.

2 MR. SMITH: I'm not sure, but I think that  
3 there's another cluster of contentions that could be  
4 addressed earlier.

5 CHAIRMAN GIBSON: Okay.

6 MR. SMITH: Obviously, the contentions are  
7 either environmental or cultural resource related.  
8 And those cultural resource contentions I presume will  
9 be dealt with by the NRC Staff through their  
10 environmental review process.

11 CHAIRMAN GIBSON: I think we all hope that  
12 will happen.

13 MR. SMITH: Right. So I'm not sure what,  
14 I'm not sure I see any other cluster of contentions  
15 that could be resolved earlier.

16 I guess I would say that there's, because  
17 this is a renewal application, and this facility's  
18 been in operation for a while, it seems to me that it  
19 might be possible to conduct the hearing based on the  
20 draft environmental documents if the other parties or  
21 the Staff was amenable to that. And that might help  
22 us, you know, move this forward a little bit, rather  
23 than having to wait until the middle of next year to  
24 have this proceeding.

25 CHAIRMAN GIBSON: Okay. Mr. Frankel --

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1 MR. FRANKEL: Yes sir.

2 CHAIRMAN GIBSON: -- do you have a view  
3 about splitting up the proceeding into at least two,  
4 if not three, separate hearings?

5 MR. FRANKEL: I do, Your Honor.

6 CHAIRMAN GIBSON: Please let us know what  
7 your views are, Mr. Frankel.

8 MR. FRANKEL: Thank you. For the court  
9 reporter, David Frankel.

10 First, I don't feel comfortable proceeding  
11 on draft environmental documents because they can  
12 change so much. And I think it would be a waste of  
13 the parties' time. As to --

14 I don't know if we lost somebody or have  
15 somebody join --

16 CHAIRMAN GIBSON: Did someone just join  
17 the call? Hello, did someone just join the call?

18 MR. FRANKEL: Perhaps left.

19 CHAIRMAN GIBSON: Okay. Perhaps someone  
20 left the call.

21 MR. FRANKEL: Okay. In any case, I  
22 believe there's a grouping of issues having to do with  
23 the existence of faults and fractures that is  
24 environmental, as opposed to safety and environmental  
25 contentions, and that, in my view, it would be

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1 appropriate to have a hearing on that so that we have  
2 some truth finding on those issues that would allow us  
3 to properly evaluate the safety, such as the arsenic  
4 and the environmental contentions.

5 CHAIRMAN GIBSON: Okay. Well, I suspect  
6 then we -- The foreign ownership issues really are I  
7 think foreign ownership and disclosure issues, really  
8 are separate, I think from the rest. But I think you  
9 all have both made a pretty good case that at least at  
10 this point there isn't a cluster of issues and  
11 contentions that could be addressed separately.

12 Obviously the cultural resource and  
13 consultation issues are one cluster, and the  
14 hydrogeological issues are another cluster, but it  
15 does seem to me that those are probably all going to  
16 be addressed in the environmental report, and so they  
17 probably need to be dealt with together, so.

18 Let me just say one more time, just to  
19 make a note here. Does the Tribe have any views about  
20 this, any differently than what we've just discussed?

21 Hello, is the Tribe there?

22 MS. LORINA: Elizabeth Lorina for the  
23 Tribe. I'm sorry, I was calling from the land line,  
24 and it kept dropping me, so I'm calling from my cell  
25 now.

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1 CHAIRMAN GIBSON: I'm glad you're back.  
2 I was just, your timing is good, I was just asking the  
3 question, do you, did you hear the discussion that we  
4 just had with respect to whether it would be  
5 appropriate to split out the environmental contentions  
6 from the safety contentions?

7 MS. LORINA: Yes I did hear. I think at  
8 least most of it.

9 CHAIRMAN GIBSON: And I -- Do you have any  
10 different view than those that have been expressed by  
11 Mr. Frankel?

12 MS. LORINA: Okay, I did not hear Mr.  
13 Frankel then. I missed that part entirely. I'm  
14 sorry.

15 CHAIRMAN GIBSON: That's okay. Well,  
16 essentially I think Mr. Frankel and Mr. Tyson are in  
17 agreement that the environmental and safety  
18 contentions are so intertwined factually that it would  
19 not make any sense to try to split those out into two  
20 separate proceedings.

21 MS. LORINA: I'm in agreement with that.

22 CHAIRMAN GIBSON: Okay. All right. And  
23 the Staff, I take it you're in agreement as well?

24 Anybody there from the Staff?

25 MR. KLUKAN: Yes, Your Honor, this is

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1 Brett Klukan for the NRC Staff. Our understanding of  
2 10-CFR-2.332 is that we couldn't commence with a  
3 hearing on environmental issues, if we would have an  
4 EIS, until that has been issued.

5 If we were to proceed under an EA, that  
6 provision would not apply. But if we were to actually  
7 issue an EIS instead of the EA, then we could proceed  
8 with the environmental issues until after the  
9 publication and promulgation of the EIS.

10 But again, the Staff will keep the Board  
11 and the parties apprised of what its thoughts are as  
12 to whether we're going to do an EA or an EIS in its  
13 monthly status report.

14 CHAIRMAN GIBSON: Okay. All right. Okay,  
15 you know, we're all, I just want to make sure that we  
16 all have our, you know, we're all on the same page of  
17 the same hymnal here. March 2 is when we will be  
18 making disclosures. Is everybody in agreement that  
19 that's the case?

20 Well let me rephrase it, is there anybody  
21 who is of the view that we are not going to be doing  
22 disclosures on March 2<sup>nd</sup>?

23 Hearing no information to the contrary, I  
24 think I want everybody to be aware that that date, we  
25 do expect you all to comply with that date.

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1 MR. SMITH: Your Honor, this is Tyson  
2 Smith for the Applicant. I don't know if this is the,  
3 necessarily the appropriate to talk about it, but we  
4 just did want to highlight a couple of items for you  
5 that may need to be addressed as part of the  
6 disclosure process.

7 CHAIRMAN GIBSON: Okay.

8 MR. SMITH: First, it's likely that we'll  
9 need to have a protective order in place. At least  
10 some of the information that we suspect we will be  
11 providing pursuant to our disclosure obligations will  
12 contain commercially sensitive proprietary  
13 information.

14 CHAIRMAN GIBSON: Yes.

15 MR. SMITH: So I don't know if, how you  
16 wanted to handle that, but I guess I would be happy to  
17 take the laboring or in crafting an agreement trying  
18 to reach a joint resolution with the other parties  
19 sometime prior to that time.

20 And also there's, apparently some of the -

21 -

22 CHAIRMAN GIBSON: Just a second Mr. Smith.  
23 I absolutely, I appreciate your offer, and would, I  
24 think we would all very much like to see you put  
25 together a draft, and hopefully, I'm sure that Counsel

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1 for the interveners will be completely reasonable and  
2 that you all would be able to reach an agreement.

3 So, why don't we do this, in anticip --  
4 Recognizing we've got that March 2<sup>nd</sup> deadline, why  
5 don't you go ahead and put together a proposal,  
6 circulate it to the other Counsel, and if you all are  
7 not going to be able to reach an agreement on your  
8 own, I would like you all to let us know immediately  
9 so that the Board can then convene a hearing to  
10 discuss what are the issues that you all are not able  
11 to resolve on your own. Fair enough?

12 MR. SMITH: This is Tyson Smith, that  
13 sounds acceptable to me.

14 CHAIRMAN GIBSON: Mr. Frankel?

15 MR. FRANKEL: This is David Frankel, thank  
16 you, that's acceptable to the --

17 CHAIRMAN GIBSON: Good.

18 MR. FRANKEL: -- Consolidated Petitioners.

19 CHAIRMAN GIBSON: Tribe?

20 MS. LORINA: That's acceptable to the  
21 Tribe, thank you.

22 CHAIRMAN GIBSON: Staff?

23 MR. KLUKAN: That's most appreciated by  
24 the Staff, Your Honor.

25 CHAIRMAN GIBSON: Okay. Good. All right,

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1 then we will proceed on that basis.

2 MR. SMITH: Sorry, this is Tyson Smith  
3 again.

4 CHAIRMAN GIBSON: Go ahead Mr. Smith, I  
5 know you had something else you wanted to say. I just  
6 wanted to try to get that one out of the way.

7 MR. SMITH: No problem. The only other  
8 item was, as part of our disclosures, again, we are,  
9 some of the material that we will have an obligation  
10 to disclose is going to be in a format that's not  
11 really amenable to reproducing.

12 A lot of these well logs are on odd sized  
13 pieces of paper and aren't in sort of traditional  
14 media. And, you know, we haven't completed our  
15 disclosures yet, so I'm not sure exactly how much or  
16 where these are.

17 But I just wanted to flag the fact that we  
18 might hopefully be working with the interveners and  
19 the Tribe to identify a way to arrange for perhaps on-  
20 site review or something like that, because  
21 reproducing these is, you know, 10,000 borehole logs,  
22 at 100 dollars a pop, is not going to be feasible for  
23 us.

24 CHAIRMAN GIBSON: Yes. Well, the, it  
25 would be incredibly burdensome to reproduce well logs.

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1 So I think the important thing is that you all, again,  
2 work something out.

3 Will say I think the really critical issue  
4 there is, I'm not trying to anticipate problems, but  
5 I think the really critical issue there is that  
6 whoever the expert is for the Tribe and the  
7 Consolidated Petitioners would need to be identified  
8 and would have signed this confidentiality agreement,  
9 and so that he could, he or she could then come onto  
10 your facility and look at the well logs in whatever  
11 format they're in.

12 And at some point, if he needs to have  
13 something reproduced from it, then I think we,  
14 hopefully you all would be able to work out some kind  
15 of protocol that will, you know, work. If not, again,  
16 you all need to let us know. But I would anticipate  
17 that that would be the way we should proceed on that.

18 MR. SMITH: That sounds fine to us. I  
19 just wanted to highlight those issues that expect to  
20 be out there, so I wanted to raise them here today.

21 CHAIRMAN GIBSON: Okay. Mr. Frankel,  
22 would that be acceptable to proceed in that fashion?

23 MR. FRANKEL: Yes Your Honor. And if we  
24 have problems, we'll bring it back. And we're  
25 committed to work in good faith to resolve problems as

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1 best we can before going back to the court if have to.

2 CHAIRMAN GIBSON: Yes, well, I certainly  
3 expect you all to be working in good faith. I realize  
4 that people can end up having differences, but there's  
5 usually no reason to have differences of opinion about  
6 disclosure of data. It can usually always be worked  
7 out if people are reasonable.

8 Tribe, do you all have any difference of  
9 opinion there?

10 MS. LORINA: No objections, Your Honor.

11 CHAIRMAN GIBSON: Staff?

12 MR. KLUKAN: Perfectly fine with the  
13 Staff, Your Honor.

14 CHAIRMAN GIBSON: Okay. Well, I think  
15 what we probably are going to want to do is, I think  
16 I would like to hear from you, Mr. Smith, about timing  
17 with respect to the foreign ownership and disclosure  
18 issues. Perhaps you could give us some idea of how  
19 you are envisioning proceeding?

20 I'm not asking you to give away any of  
21 your, you know, strategy here. But just in terms of,  
22 for all of us to be able to plan, you could let us  
23 know how you would like to proceed. If, you know, Mr.  
24 Frankel and Tribe are in agreement, and Staff, then I  
25 think we could just proceed along within those time

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1 structures.

2 MR. SMITH: Certainly. And I guess right  
3 now the deadline for the briefing on the merit that  
4 you had, the Board had discussed in its decision on  
5 standing and contentions, the January 21<sup>st</sup> deadline,  
6 and that was respect to miscellaneous contention G,  
7 which was the contention of omission, and  
8 miscellaneous contention K, which was whether or not  
9 there was a statutory or regulatory prohibition on a  
10 100 percent foreign owner.

11 With respect to contention G, that's the  
12 contention of omission --

13 MR. FRANKEL: Can I interrupt here? I  
14 appreciate your statement -- This is David Frankel.  
15 I appreciate your perspective of the contention, but  
16 I believe that it was phrased as whether or not the  
17 NRC lacked the authority to grant the license, not  
18 whether there's a prohibition on granting the license.

19 CHAIRMAN GIBSON: Okay, that's fine Mr.  
20 Frankel. Go ahead Mr. -- You'll have your chance to  
21 talk. Go ahead Mr. Smith.

22 MR. SMITH: So with respect to  
23 miscellaneous contention G, which was the contention  
24 of omission, we have filed or in the process of  
25 filing, actually I'm not certain whether it's actually

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1 been received by the NRC yet, an amendment to our  
2 application that contains information regarding the  
3 ownership of Crow Butte. And so we're going to plan  
4 to submit that, a copy of that, along with the motion  
5 for summary disposition, saying that the contention is  
6 moot.

7 With respect to the other contention,  
8 miscellaneous contention K, whether the NRC has the  
9 authority, or whether it's statutorily or regulatorily  
10 prohibited, I think our view there would be we would  
11 submit on the merits a legal discussion showing that  
12 there is no such prohibition.

13 CHAIRMAN GIBSON: Okay.

14 MR. KLUKAN: Your Honor, not to interrupt,  
15 this is Brett Klukan for the NRC Staff. Once we  
16 receive that amendment for the Applicant, we will post  
17 those public portions online in the ADAMS system. And  
18 can even include that as part of our Staff report, the  
19 ML number for that.

20 MR. SMITH: This is Tyson. Of course  
21 we'll provide -- As soon as I get a confirmation, and  
22 I get a copy myself that's been sent, I'd be happy to  
23 pass it along to Mr. Frankel. I had told him we  
24 intended to do this a few weeks back. So I just  
25 wanted to, you know, we are working together to make

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1 sure people get that information.

2 CHAIRMAN GIBSON: Thank you, Mr. Smith.

3 MR. FRANKEL: May I? This is David  
4 Frankel.

5 CHAIRMAN GIBSON: Yes.

6 MR. FRANKEL: Yes, Mr. Smith did let me  
7 know a couple weeks ago about this, and we appreciate  
8 it then and now his letting us know their proposed  
9 strategy on that.

10 It seems to me that on miscellaneous K,  
11 and miscellaneous G, I just heard reference to there  
12 being public and non-public portions of the amendment  
13 to the renewal, which would then be posted. I heard  
14 that from Mr. Klukan.

15 I'm wondering why it wouldn't all be  
16 public, and if so, what are the parts that are not  
17 going to be disclosed to the petitioners?

18 MR. KLUKAN: If I may clarify, Your Honor.  
19 This is Brett Klukan. I was only anticipating that if  
20 there were non-public portions, to the amendment, we  
21 would not post those on ADAMS. I have no knowledge  
22 that there will be any public portions.

23 I was just simply representing that if in  
24 the case we don't post the entire amendment, or  
25 license amendment, application, or amendment to the

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1 application, on public ADAMS, it's simply because the  
2 Applicant submitted non-public information. I'm not  
3 aware that there would be any such information. I was  
4 just making that clear.

5 MR. SMITH: And this is Tyson Smith. The  
6 entire amendment is publicly available, and  
7 information that all the parties have seen previously.

8 MR. FRANKEL: Okay. Thank you.

9 CHAIRMAN GIBSON: Okay. Good. Well,  
10 thank you. Now, I guess what I'm envisioning then is  
11 that we will have a chance to review the briefs, and  
12 we may want to have oral argument on those. I don't  
13 know yet, because obviously we haven't read them.

14 But I guess what we will do is, I would  
15 just like you all to be aware of that possibility that  
16 we may want to be doing that. And it might be a good  
17 idea to try to clear some time out in -- When -- Let's  
18 see, the, perhaps later in March? Let me ask you if  
19 the second half of March, is there -- What are your --

20 Let me first of all ask you, would you all  
21 be okay if we needed to have oral argument, doing it  
22 in the second half of March? And secondly, if so, do  
23 you know whether there's any dates that are going to  
24 be bad?

25 I'll start with you, Mr. Smith.

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1 MR. SMITH: I do not have any conflict in  
2 March currently.

3 CHAIRMAN GIBSON: Okay. Mr. Frankel?

4 MR. FRANKEL: Likewise, I have no  
5 conflicts in March, Your Honor.

6 CHAIRMAN GIBSON: Tribe?

7 MS. LORINA: March is clear, Your Honor.

8 CHAIRMAN GIBSON: Staff?

9 MR. KLUKAN: March is clear as well, Your  
10 Honor.

11 CHAIRMAN GIBSON: Good. Okay. Well that  
12 makes it easy. We will have a chance to look at the  
13 initial -- I'm sorry, we'll have a chance to look at  
14 the briefs. And if we believe oral argument is  
15 appropriate, we will set it sometime in March. I  
16 guess the only thing I would ask you all to do is, if  
17 you all do end up having a conflict arise in March,  
18 that you let us know. Because getting, however many,  
19 what is it, ten people in one place at one time is not  
20 an easy thing to do, as we know from the first time we  
21 did this.

22 I guess one of the things that I wanted to  
23 try to find out is, there seems to be some question  
24 about the Consolidated Petitioners wishing to join in  
25 the Tribe's environmental contentions, and some Staff

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1 opposition to that. Mr. Klukan, could you let us know  
2 what it is that you don't want to see happen with  
3 respect to the Consolidated Petitioners participating  
4 with respect to these issues?

5 MR. KLUKAN: I mean, this is Brett Klukan  
6 for the NRC Staff, Your Honor, the issue is pretty  
7 clear. We simply don't want the Consolidated  
8 Petitioners to have a chance to argue issues not  
9 related to contentions that were found -- Their  
10 contentions that the Board found were actually  
11 admissible.

12 JUDGE ROSENTHAL: Why? This is Alan  
13 Rosenthal. I don't understand precisely what Staff's  
14 concern is in that regard. I might note that the  
15 Applicant apparently had no problem with the  
16 participation on the part of Consolidated Petitioners  
17 on the certain Tribe contentions.

18 I find it a little surprising that the  
19 Staff, which as far as I'm concerned does not have a  
20 dog in this fight, should be expressing a concern that  
21 apparently is not possessed by the Applicant. At  
22 least the Applicant didn't join in the Staff's  
23 expression of concern, nor did it put in an  
24 independent expression of itself.

25 I mean, it just seems to me very strange

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1 that we're getting this kind of concern being  
2 expressed by the Staff, and not by the Applicant who  
3 once again, it's its application that's before the  
4 House.

5 So I would like to know just precisely  
6 what prejudice the Staff sees flowing from the request  
7 of the Consolidated Petitioners to, as I understand  
8 it, simply to be in a position to and express an  
9 opinion in briefs on this issue of, when it comes  
10 before the Board for consideration on the merits.  
11 Doesn't seem to me that there's any prejudice  
12 attaching to anybody, and most particularly not Staff.

13 MR. KLUKAN: Your Honor, this is Brett  
14 Klukan, our dog in this fight is simply that it's a  
15 Staff obligation to uphold and guard the Commission's  
16 regulations. The process for adoption of contentions  
17 were sent out with the notice of hearing, Consolidated  
18 Petitioners' request to join didn't follow that  
19 process.

20 To allow them to argue contentions not  
21 their own or otherwise not found admissible in this  
22 proceeding by this Board would be to circumvent the  
23 Commission's clear regulations on this --

24 JUDGE ROSENTHAL: I'm asking you what, I  
25 mean, I understand that the Staff regards itself as

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1 the self-appointed defender of regulations, but I'm  
2 asking you the question as to what prejudice is going  
3 to be sustained by any party to this proceeding if the  
4 Consolidated Petitioners are allowed to do what  
5 they've asked to be allowed to do.

6 I'm talking prejudice. If there's no  
7 prejudice, sir, I don't understand why this Board  
8 should entertain your objection at all.

9 Now, I'm just the advisor to the Board,  
10 I'm not a member of it. It would be certainly my  
11 recommendation as advisor to the Board to simply deny  
12 your request out of hand, unless you're able to  
13 establish that there is some concrete prejudice to  
14 some party.

15 And in that regard, I remind you of the  
16 fact that the licensee or Applicant apparently doesn't  
17 see that any prejudice, and it's its dog that's in the  
18 fight, not yours.

19 MR. SMITH: This is Tyson Smith for the  
20 Applicant. Actually I would say, I appreciate the  
21 Staff raising this point, and it's not a perspective  
22 I really appreciated until I saw the Consolidated  
23 Petitioners' reply today.

24 I had interpreted the joinder as saying  
25 they just wanted to participate on the contention with

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1 the Tribe. But based on their reply brief, what they  
2 really want to do is submit their own arguments and  
3 briefing on the merits on these issues.

4 And then there would be a prejudice,  
5 because then we'd be required to respond to two sets  
6 of arguments, prepare responses for two different sets  
7 of experts or briefings on the issue. And that is  
8 exactly what the Commission's rules in 2.309 are  
9 designed to prevent. It says, if two or more  
10 petitioners want to cosponsor a contention, they need  
11 to work together.

12 JUDGE ROSENTHAL: As I understand it, they  
13 are not seeking to sign onboard that contention. What  
14 they're seeking is an entitlement to an express an  
15 opinion with respect to whatever the record might  
16 produce after an evidentiary hearing.

17 Now I don't see that as a violation of any  
18 provision of the rules, so would you --

19 MR. SMITH: Sure, 2.309(f)(3) says, if two  
20 or more petitioners seek to co-sponsor a contention,  
21 the requesters shall --

22 JUDGE ROSENTHAL: They're not seeking to  
23 co-sponsor a contention as I understand it.

24 MR. SMITH: As I understand, there's no  
25 other mechanism by which a petitioner can provide an

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1 advisory opinion on an issue for which they have not  
2 been admitted as a party.

3 JUDGE ROSENTHAL: What's the provision or  
4 the rule that prevents that?

5 MR. KLUKAN: Your Honor it's not  
6 necessarily the provision that prevents it, it's what  
7 provision provides that they can do that.

8 They essentially proffered this contention  
9 before the Board, on that, hydrological connectivity,  
10 which the Board found admissible for the Tribe, it  
11 found nonetheless admissible for the Consolidated  
12 Petitioners for the very areas the Board points out.

13 To allow them to provide the independent  
14 briefing on those contentions would be a direct, would  
15 directly allow for the circumvention of the  
16 Commission's regulation for contention pleading.

17 JUDGE ROSENTHAL: All right. Mr. Frankel,  
18 what's your response to that?

19 MR. FRANKEL: Well, our response to that  
20 is that in order to have a chance to voice ourselves,  
21 some of our petitioners are members of the Tribe,  
22 we're not seeking to lead or make any decisions with  
23 respect to those contentions. We've been very  
24 efficient with our briefing, and we cooperate the most  
25 we can with the Tribe, keeping timetables to

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1 consolidate briefings, and to minimize people's  
2 paperwork.

3 And I feel that any decision that the  
4 Board comes to would have, would be, have a greater  
5 amount of force in sort of withstanding any appeals if  
6 we're allowed to voice ourselves on these issues. And  
7 I feel like, you know, we don't want to be -- We want  
8 to be able to voice ourselves and not complain about  
9 it later. If on a technicality we can't voice  
10 ourselves on these issues, then it makes us feel like  
11 we didn't get a chance to participate fully.

12 MR. KLUKAN: Your Honor, this is Brett  
13 Klukan with NRC. It seems that if the Consolidated  
14 Petitioners wanted to voice their issues on this,  
15 which they could have done had they proffered an  
16 admissible contention on these issues. The Board,  
17 though, found that with regard to certain of the  
18 Consolidated Petitioners' contentions, that they were  
19 nonetheless inadmissible.

20 The Tribe though had proffered admissible  
21 contentions as required of it under the NRC's  
22 regulations so as to having hearing on these issues.  
23 The Consolidated Petitioners didn't do that.

24 I fail to see how allowing them to brief  
25 these issues independently would be anything other

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1 than a circumvention of the Commission's pleading  
2 requirements with regard to the contention.

3 JUDGE ROSENTHAL: They would be, as I  
4 understand it, they would be briefing only on  
5 contentions that had been admitted. Is that not the  
6 case? It's not on inadmissible contentions, it's  
7 contentions that were admitted on the Tribe's hearing  
8 request. Is that right?

9 MR. KLUKAN: That is correct, Your Honor.  
10 But nonetheless, those are the Tribe's contentions.

11 JUDGE ROSENTHAL: This seems to me to be  
12 hyper-technical. And as far as I'm concerned, again  
13 I'm not on the Board, the Board members will decide  
14 this, but it seems to me you haven't made out a case  
15 for prejudice. And so far as the Applicant is  
16 concerned, its objection it seems to me is untimely.  
17 And I don't see any basis for a conclusion that  
18 anybody is prejudiced in fact, by allowing the  
19 Consolidated Petitioners to express their views with  
20 regard to admitted contentions that were contained in  
21 the Tribe's hearing request.

22 But that's going to be the Board's  
23 decision, that's just my view of it.

24 CHAIRMAN GIBSON: Okay. Is there anything  
25 else that we need to cover? Let me ask, start with

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1 the Applicant. Is there anything else that you  
2 believe we need to cover today?

3 MR. SMITH: No, Your Honor.

4 CHAIRMAN GIBSON: Mr. Frankel, is there  
5 anything else you believe we need to cover today?

6 MR. FRANKEL: No, Your Honor.

7 CHAIRMAN GIBSON: Tribe?

8 MS. LORINA: No, Your Honor.

9 CHAIRMAN GIBSON: Staff?

10 MR. KLUKAN: No, Your Honor.

11 CHAIRMAN GIBSON: Okay. Well, it's good  
12 that we were able to agree on something.

13 Okay. Well, I think what will be most  
14 beneficial then is for you all to just be sure and let  
15 us know if you all come up with any scheduling  
16 problems in March, so that we can work around that.  
17 And if we do decide to have oral argument in March.

18 And secondly, staff, we will very much  
19 appreciate receiving those status reports on the  
20 progress of the safety and environmental reports that  
21 you all are working on.

22 With that --

23 MR. SMITH: I'm sorry, if I'm -- I  
24 apologize. I just wanted, I assumed we would cover  
25 this in the wrap-up, and I want to make sure for

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1 actually the other parties' convenience that this is  
2 correct.

3 With respect to miscellaneous contention  
4 G, that's the omission, because the Applicant plans to  
5 file the summary disposition motion on the 21<sup>st</sup>, I  
6 think that would mean that noone else needs to file  
7 anything on the 21<sup>st</sup> with respect to that contention?  
8 I just wanted to confirm, so that noone's trying to  
9 address the legal of whether you have to include that  
10 information in the application. I just wanted to make  
11 sure that that's clear to everyone.

12 MR. FRANKEL: Well, this is David Frankel.  
13 We're going to oppose your motion for summary  
14 disposition, and we'll --

15 MR. SMITH: Correct.

16 MR. FRANKEL: -- as we deem appropriate,  
17 because we feel that it should be disclosed in every  
18 application. We want to see legal precedence to that  
19 effect..

20 CHAIRMAN GIBSON: Let me just, let's just  
21 back up a second --

22 MR. SMITH: Okay, that's fine then. I  
23 apologize, I misunderstood the context. I thought we  
24 were just moving past that.

25 CHAIRMAN GIBSON: No, I'm glad you raised

1 this. What, Mr. Smith, what I understand you to be  
2 saying then is that in light of the fact that you all  
3 have submitted an amendment, and will be moving for  
4 summary disposition on the grounds that it is moot, I  
5 take it that you are suggesting then that most  
6 appropriate thing to do would be to change the order  
7 that we have things in currently, so that the other  
8 parties can address your motion for summary  
9 disposition instead of submitting briefings on the  
10 disclosure issue?

11 MR. SMITH: Correct. That was my  
12 thinking. And they could just reply in the regular,  
13 normal course for responding to summary disposition  
14 motions, which I believe matches the timing you've  
15 laid out, 20 days for a response.

16 CHAIRMAN GIBSON: Okay. Now, so, all  
17 you're suggesting is that rather than you submitting  
18 a brief, you're going to be submitting a motion?

19 MR. SMITH: Correct. You know, I didn't  
20 want everyone else to go through the effort and spend  
21 time and resources addressing an issue that is  
22 arguably moot. We do not plan to address the issue of  
23 whether every application needs to have that  
24 information in it, because we will have provided it  
25 for this application.

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1 CHAIRMAN GIBSON: Okay. So --

2 MR. FRANKEL: This is David Frankel. May  
3 I?

4 CHAIRMAN GIBSON: Yes, I was just going to  
5 -say, Mr. Frankel, I hope then that that is essentially  
6 what you're planning on doing anyway, but rather than  
7 having to address all of whether every application  
8 must have this disclosure, you're going to be  
9 addressing -- I guess you can still address that if  
10 you want, but you also need to be planning to address  
11 whether that moots the question.

12 MR. FRANKEL: Yes.

13 CHAIRMAN GIBSON: Okay.

14 MR. FRANKEL: And we will address that.  
15 And if the motion for summary disposition is not  
16 granted based on the papers, then, would there then be  
17 subsequent briefing on the original issue as to  
18 miscellaneous G?

19 CHAIRMAN GIBSON: Yes, I'm sure there will  
20 be.

21 MR. FRANKEL: Okay.

22 CHAIRMAN GIBSON: But, you know, let's  
23 just see where we are at that point. I think, it  
24 sounds to me like we're probably going to be heading  
25 towards, in another direction, but again, I don't want

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1 to prejudge that issue. So we will see it when we, it  
2 comes in.

3 MR. FRANKEL: Okay.

4 CHAIRMAN GIBSON: Now, with that, slight  
5 detour, is there anything else that anyone has?

6 Hearing done. I wish you all the best of  
7 holidays, and look forward to hearing from Staff, and  
8 well from all of you, after the first of the year.

9 MR. FRANKEL: Thank you very much,  
10 everybody.

11 MR. SMITH: Thank you.

12 MR. MCGUIRE: Very well, thank you.

13 MR. KLUKAN: Thank you, Your Honor.

14 (Whereupon, the above-entitled matter was  
15 concluded at 1:53 p.m.)

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CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:           Crow Butte Resources, Inc.

Name of Proceeding: Pre-Hearing Conference  
Docket Number:           40-8943;  
ASLB No. 08-867-OLA-BD01  
Location:                 teleconference

were held as herein appears, and that this is the  
original transcript thereof for the file of the United  
States Nuclear Regulatory Commission taken by me and,  
thereafter reduced to typewriting by me or under the  
direction of the court reporting company, and that the  
transcript is a true and accurate record of the  
foregoing proceedings.

  
Eric Mollen  
Official Reporter  
Neal R. Gross & Co., Inc.

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