

February 26, 2009 (7:01pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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

Before Administrative Judges:
Michael M. Gibson, Chairman
Dr. Richard F. Cole
Mr. Brian K. Hajek

In the Matter of

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

Docket No. 40-8943
ASLBP No. 08-867-02-OLA-BD01

February 26, 2009

INTERVENORS' MOTION RE: PERPETUATION OF TESTIMONY

Pursuant to 10 CFR §2.323(a), Intervenors file this motion concerning perpetuation of testimony of Aloysius Weasel Bear ("Deponent"), son of Beatrice Long Visitor Holy Dance, who was born and raised at Slim Buttes next to The White River and who has recently been diagnosed with terminal pancreatic cancer.¹ Pursuant to Subpart L, the deposition will need to comply with Section 2.1203(d), 2.1204(b), 2.1207, and 2.1208, inter alia.

Petitioners hereby move that this Board issue an Order: (1) authorizing the perpetuation of testimony of Deponent as described in FRCP 27; (2) allowing for the portions of such deposition deemed relevant by Intervenors to be submitted in this proceeding under Subpart L at the appropriate time in the course of this proceeding giving NRC Staff and Applicant opportunity under applicable regulations to object to

¹ Pursuant to 10 CFR §2.323(b), Attorney for Intervenors contacted the parties to this proceeding to discuss this motion. The movant has contacted the parties and made a sincere effort to resolve the issues raised (and in fact resolved several issues in discussions with counsels). NRC Staff Counsel stated that it would not oppose this motion and Applicant's Counsel stated that Applicant "does not have enough information to evaluate the motion, but will review the motion once filed and will respond in due course." Neither the Oglala Sioux Tribe nor the Oglala Delegation of the Black Hills Sioux Nation Treaty Council has any objection to this motion.

such submissions and seek the Board's ruling on the relevance of the submitted portions and which parts of the submitted portions will be accepted as evidence in this proceeding; (3) finding that it is in the interests of justice and the orderly and efficient administration of this proceeding to waive, to the extent applicable, the notice and service requirements of FRCP 4 as they may apply to perpetuation of testimony under FRCP 27 due to the actual service made on Applicant and NRC Staff of the proposed Rule 27 Petition (a draft of which is attached); (4) Order that to the extent that the deposition does not comply with the cross-examination rules of Subpart L, such non-compliance shall be deemed non-material for purposes of establishing admissibility of the proffered testimony in light of the exigent circumstances and the opportunity by all parties and the Board to be present and ask cross-examination questions; and (5) such other Orders as the Board finds to be necessary or appropriate in the interests of justice and developing a sound record in this proceeding, as contemplated below.

DISCUSSION

1. Rule 27 Petitions Generally. Intervenor's acknowledge that while the Federal Rules of Civil Procedure may serve as guidance in applying NRC rules of procedure, they are not required to be used in NRC proceedings.² However, separate from any NRC proceeding, there is an independent right to bring an action under FRCP 27 to perpetuate testimony where, as here, there is an expectation of future federal court action (in this case an appeal) and the action cannot presently be brought.³ A court may

² Cincinnati Gas and Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1), LBP-82-47, 15 NRC 1538, 1542 (1982).

³ See, Ash v. Cort, 512 F.2d 909 (3d Cir. 1975); In re: MacCormack, 2000 WL 526313, at 81 (D. Kan. April 19, 2000) ("Rule 27 is not a substitute for general discovery; instead it is intended only for the perpetuation of testimony or other evidence.")

issue an order permitting the deposition 'if the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice.'⁴

Since Deponent and Beatrice Long Visitor Holy Dance⁵ are both members of the Oglala Sioux Tribe, the Rule 27 Petition may be filed in the Tribal Court of the Oglala Sioux Tribe and it is expected that such a Rule 27 Petition will be so filed.⁶ Further, Rule 27 is often used to require an adverse party to appear for a deposition or production of records but it may likewise be used by non-adverse parties to perpetuate testimony if there is a risk of loss of the desired testimony. Here, it is not proposed to depose an adverse party or seek discovery; rather, it is proposed to perpetuate the testimony of a material witness before he becomes unable to answer questions. Accordingly, even if the Board does not find Rule 27 to be applicable in this proceeding as a matter of law, the Board may take appropriate actions, including those contemplated by Rule 27, in order to perpetuate testimony, assist Intervenors in the perpetuation of testimony, and resolve any and all cross-examination and procedural issues.

2. Board Powers Concerning the Deposition. The Board clearly has the power to authorize the deposition as proposed herein and, should it so decide, to actually administer the oath to Deponent, and examine Deponent.⁷ Accordingly, the Board has

⁴ Kunimoto v. Lehman, 1996 WL 622094, at 2 (D.D.C. Oct. 16, 1996); see also Penn. Mut. Life Ins. Co. v. US, 68 F.3d 1371, 1374-75 (D.C. Cir. 1995).

⁵ Beatrice Long Visitor Holy Dance is an Intervenor in the Renewal Proceeding and is part of the Oglala Sioux Tribe which is an intervenor in both the Renewal Proceeding and the Expansion Proceeding; as such she is part of both proceedings and the Intervenors in both proceedings intend to submit the testimony of Deponent in support of the admitted contentions, particularly those involving Arsenic and pancreatic cancer.

⁶ See Chapter 2 of the Oglala Sioux Tribe Code of Law and Order, Sections 20.9(a), 20.27 and 21. A draft Rule 27 Petition related to the proposed deposition is attached (excluding the affidavit of Beatrice Long Visitor Holy Dance which will be filed in the Tribal Court to support the verified petition).

⁷ See 10 CFR §2.319(a) (administer oaths); (d) (rule on offers of proof and receive evidence); (f) (order depositions to be taken as appropriate); (i) (examine witnesses); and (r) (take any other

the authority to authorize the Rule 27 Petition, to allow all or a portion thereof to be made part of the record in this proceeding and to make other related orders to facilitate the timely taking of the deposition in a manner that allows relevant portions thereof to be used in this proceeding without requiring any future examination or cross-examination.

3. Issues Pertaining to Cross-Examination. There are many issues presented related to cross-examination that derive from the limitations on cross-examination found in Subpart L.⁸ These issues are complicated by the fact that the Deponent will likely not be available for future direct examination or cross-examination due to the terminal illness. Accordingly, Intervenors submit that the appropriate course of action is not to restrict direct examination or cross-examination in the deposition itself but rather to apply appropriate restrictions in determining the admissibility of evidence proffered, when it is proffered, in the proceeding under the Subpart L rules.

In addition, it is possible that the presiding officer will desire to attend the deposition and propound follow-up or clarifying or cross-examination questions and the presiding officer is invited to do so.⁹ However, Intervenors submit that since the deposition may be taken under FRCP 27 and Chapter 2 of the OST Law and Order Code without the order of the Board, it is not necessary for the Board to attend or ask any questions at the deposition. Intervenors have no objection to the Board attending the deposition and asking questions; although it is possible, even likely, that NRC Staff

action consistent with the Act, this chapter and 5 USC §§551-558 (i.e., the Administrative Procedure Act)).

⁸ See 2.706(a)(4) (cross-examination must proceed as at a hearing) and 2.1204(b) (requests for cross-examination and cross-examination plan submitted to and kept by the presiding officer; cross-examination only allowed if presiding officer determines that cross-examination is necessary to ensure the development of an adequate record for decision.)

⁹ Notably, by email dated February 24, 2009, NRC Staff Counsel Klukan advised that it was the position of the NRC Staff that the Board should not attend the deposition because it would needlessly complicate the process.

and/or Applicant would object to the Board's presence at the deposition.¹⁰ In light of the deteriorating physical condition of the Deponent, if the Board decides not to attend the deposition, Intervenors request that we be permitted to submit the entire deposition, signed by Deponent¹¹, immediately after the transcript is reviewed and corrected for mistakes. Thereafter, the Board would review the transcript and promptly determine if there are any follow-up or clarifying questions for the Deponent which may be answered in writing or in person (or perhaps by telephone) as ordered by the Board, and so notify the parties. This way it may be possible for such questions to be addressed before the Deponent's deteriorating health interferes with his ability to answer questions.¹² There is no assurance that any such process would be completed before Deponent becomes unavailable.

4. Proposed Deposition.

(a) Scheduling the Deposition: It is proposed that the deposition of Deponent take place in conjunction with the potential March 24th hearing regarding foreign ownership.¹³ Since the parties have reserved March 24th, it would be a convenient date to hold the deposition. If the Board orders a hearing for that date, the deposition could be held on March 23rd or March 25th, for the convenience of the parties. A proposed time for the deposition is 1:00 p.m., subject to availability of space at the proposed time.

¹⁰ Although Applicant's Counsel has not objected to the concept of the Board asking questions, he has not endorsed that concept and has reserved his right to object and has taken no position on this Motion.

¹¹ Assuming his continued availability as of that time.

¹² NRC Staff Counsel Klukan stated that he would be amenable to setting up some kind of expedited process such as this to allow for Board review of the testimony and follow-up questions.

¹³ The Renewal Board asked the parties to reserve March 24th but has not ordered a hearing for that date as of this time.

(b) Place of Deposition. In light of the fragile nature of Deponent's health, it is proposed that the deposition be taken at the Moses Two Bulls Judiciary Building, Pine Ridge Indian Reservation, or at such other place and time that is mutually agreeable to Beatrice Long Visitor Holy Dance and Deponent to perpetuate his testimony. Deponent sometimes receives medical treatment in Rapid City and it may be possible to agree on a location in Rapid City without causing Deponent undue strain.

(c) Scope of Deposition. The substance of the testimony expected from the Deponent is that: (1) Deponent was born and raised at Slim Buttes and drank the water there, gardened with it, ate vegetables from such gardens, used The White River, fished out of it, ate out of it, bathed in it and did the same from the water at the well at Slim Buttes and from the tap once the Mni Wiconi water project was connected to the tap at the house at Slim Butte which is shared by Beatrice Long Visitor Holy Dance with Deponent; (2) Deponent has a deteriorating health condition and all facts related to the deterioration of Deponent's health, the development of diabetes and the development of pancreatic cancer as well as all facts related thereto or which might tend to show a relationship between the operations of the mine, exposure to Arsenic through use of and exposure to water and to contaminants; (3) information concerning the sacredness of the water and ceremonial uses of water by Deponent; and (4) any information that Deponent wants to put on the record that may be relevant to any actions that may be brought in federal court (including appeals of this proceeding).

(d) Reason for Need to Perpetuate Testimony. The reasons to perpetuate this testimony is that Deponent will likely not be available due to the terminal

nature of pancreatic cancer when the ASLB proceedings mature to the point where such testimony may be heard. Further, it is likely that other proceedings will arise that are not governed by ASLB rules and in which the testimony will be relevant. Deponent's testimony is material, relevant and unique because Deponent is the only known case of pancreatic cancer at Slim Buttes to date and the only known case that can be traced to the link between the mine's operations, releases of Arsenic, faults and fractures connecting the mined aquifer to the Arikaree aquifer, contamination pathways along The White River which transects Slim Buttes. Therefore, it is both urgent and essential that Deponent's testimony be perpetuated for use in pending and future legal proceedings.

(e) Examination of Deponent. Intervenors' counsel will direct the deposition by propounding questions under oath on the record by a federal, South Dakota or Nebraska court reporter (provided such court reporter would be acceptable to federal district court in Rapid City, South Dakota). Potentially adverse parties such as Applicant and the NRC Staff may cross-examine and Intervenors' counsel may re-direct, if appropriate. To the extent that the Board desires to propound questions directly, it may do so.¹⁴

(f) Use of Deposition Testimony Once Perpetuated. The deposition testimony may be offered by Intervenors under Subpart L. Therefore, once perpetuated, the deposition testimony will be one item of evidence that will be submitted by Intervenors at the appropriate time in this proceeding, objected to (or not) by Applicant and/or NRC Staff in accordance with applicable regulations, and made the subject of a

¹⁴ As noted, NRC Staff Counsel does not believe it is appropriate for judges to be present based on the parties' mutual understanding that the point is to perpetuate 'raw' testimony in the event of Deponent's passing. Intervenors do not have a position on whether it is appropriate for judges to attend and propound questions under their authority in this proceeding.

ruling by the Board on the admissibility of the proffered portions of the deposition testimony. Nothing in the perpetuation of testimony of Deponent is intended to constitute “discovery”¹⁵ but rather is solely to perpetuate testimony of a dying witness.

CONCLUSION

For all the foregoing reasons, the Board should issue the order requested by Intervenors herein.

Dated this 26th day of February, 2009.

Respectfully submitted,

/s/

David Frankel
Attorney for Intervenors
P. O. Box 3014
Pine Ridge, SD 57770
308-430-8160
E-mail: arm.legal@gmail.com

¹⁵ It is acknowledged that 10 CFR §2.336(f) provides that mandatory disclosures under Section 2.336 constitute sole discovery permitted unless there is further provision for discovery under the specific subpart under which the hearing will be conducted.

1 David Frankel (OST Bar No. ___)
POB 3014
2 Pine Ridge, SD 57770
Telephone: (308) 430-8160
3 Facsimile: (831) ___ - ___

DRAFT

4 TRIBAL COURT
OF
5 THE OGLALA SIOUX TRIBE

6
7 BEATRICE LONG VISITOR HOLY
DANCE (WEASEL BEAR),
8 Petitioner,
9
10 IN RE: ALOYSIUS WEASEL BEAR,
Deponent.

) Civil Action No.: _____
)
) VERIFIED PETITION UNDER
) FRCP RULE 27
) FOR PERPETUATION OF
) TESTIMONY OF MEMBER OF
) OGLALA SIOUX TRIBE
) ON URGENT BASIS BASED ON
EXIGENT CIRCUMSTANCES OF
DYING WITNESS

11
12 PRELIMINARY STATEMENT

13 1. This action arises under Federal Rule of Civil Procedure 27 concerning perpetuation of
14 testimony, which is applicable in this Court by virtue of Chapter 2 of the Oglala Sioux Tribe
15 Code of Law and Order, Sections 20.9(a),¹ Section 20.27², and Section 21.³

16 2. Aloysius Weasel Bear ("Deponent") is an enrolled member of the Oglala Sioux Tribe
17 who has recently been diagnosed with pancreatic cancer.⁴ The exact number of months of his
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20 ¹ (a) The time and place of court sessions, the rules of evidence to be followed by the Court and all other
21 details of judicial procedure may be set out in Rules of Court or Federal Rules of Civil Procedures in the
22 absence of Tribal rules.

21 (b) All testimony of witnesses shall be given orally under oath in open court and subject to the right of
22 cross examination. Documentary and tangible evidence shall also be received in open court.

22 ² In determining any case over which it has jurisdiction, the Oglala Sioux Tribal Court shall give binding
23 effect to: (a) any applicable constitutional provision, treaty, law, or any valid regulation of the United
24 States; (b) any applicable provision of the Tribal Constitution or any law of the Tribe not in conflict with
25 federal law.

24 ³ In all civil cases the Oglala Sioux Tribal Court shall apply any laws of the United States that may be
25 applicable, any authorized regulations of the Interior Department, and any ordinances of the Tribe, not
prohibited by Federal law.

⁴ Affidavit of Beatrice Long Visitor Holy Dance, at ¶ ____.

1 expected remaining life are uncertain.⁵ Doctors have advised that Mr. Weasel Bear may not
2 have until Summer.⁶ If his condition worsens, he may not have until Spring.⁷ Accordingly,
3 Petitioner requires an Order of the Court authorizing Petitioner to depose Deponent, Aloysius
4 Weasel Bear, to be taken at the [Moses Two Bulls Judiciary Building, Pine Ridge Indian
5 Reservation] on [March 23, 2009], at [1:00 p.m.], or at such other place and time that is mutually
6 agreeable to Petitioner and Deponent to perpetuate his testimony.

7 3. Petitioner, Beatrice Long Visitor Holy Dance (Weasel Bear) is the mother of Deponent
8 and is an Intervenor in two pending administrative proceedings before the Atomic Safety and
9 Licensing Board (“ASLB”) of the United States Nuclear Regulatory Commission (“NRC”)
10 (ASLBP No. 07-859-03-MLA-BD01 & ASLBP No. 08-867-02-OLA-BD01).⁸ The Oglala Sioux
11 Tribe is also a party.⁹ Any final decision of the Nuclear Regulatory Decision is subject to appeal
12 in the federal courts, specifically, the United States Court of Appeal, pursuant to the Hobbs Act,
13 28 USC §2342(4), §2344, and the Atomic Energy Act of 1954, as amended (42 USC. §
14 2239(a)(1)). Both Petitioner and Deponent reside at Pine Ridge Indian Reservation.¹⁰

15 4. In both ASLB cases, it is an “admitted contention” under applicable NRC regulations as
16 to whether the operations of the ISL uranium mine operated by Crow Butte Resources, Inc. at
17 Crawford, NE, approximately thirty (30) miles West of Pine Ridge Indian Reservation, is
18 causing the release of Arsenic in a manner that results in pancreatic cancer among people
19 exposed to the contamination. See ASLB rulings LBP-08-06 (& LBP-09-01 respecting

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21 ⁵ Id.

22 ⁶ Id. Doctors are not always right, the matter is in the hands of Tunkasila, miracles happen and Mr.
23 Weasel Bear is a Sun Dancer - a man of prayer and his entire family practice traditional ways and are
24 praying. However, for purposes of this legal proceeding, what the Doctors are saying and what is
generally known about pancreatic cancer is that unless caught early (not this case), it is often fatal within
a very short time of a few months.

25 ⁷ Affidavit of Beatrice Long Visitor Holy Dance, at ¶__.

⁸ Id.

⁹ Id.

¹⁰ Affidavit of Beatrice Long Visitor Holy Dance, at ¶__.

1 Arsenic/pancreatic cancer), and LBP-08-24 (& LBP-08-24 respecting Arsenic/pancreatic
2 cancer). Copies of these court rulings are available in the "ADAMS" system at the NRC's
3 website at www.nrc.gov.

4 5. FRCP 27(a)(1) states the requirements for a Petition, as follows:

5 (A) Petitioner expects to be a party to an action cognizable in a United States
6 court, including appeals of final decisions of the Nuclear Regulatory Commission ("NRC"). The
7 NRC is not expected to render a final decision for more than a year from now.¹¹ Due to the
8 nature and timing of the NRC ASLB proceedings, Petitioner cannot presently bring any appeal in
9 federal court or cause it to be brought with respect to these matters until 2010-2011.

10 (B) The subject matter of the expected action relates to issues arising out of
11 the admitted contentions in the ASLB proceedings concerning the release of Arsenic from the
12 operations of the Crow Butte mine into pathways for human ingestion, including into The White
13 River and the Arikaree aquifer, and related health impacts therefrom including pancreatic cancer,
14 and any and all issues arising from such issues and any and all other legal, equitable and/or
15 administrative claims arising from the foregoing. Petitioners' interest is represented by the fact
16 that Petitioner lives at Slim Buttes not far from the house where Deponent was born and raised;
17 Petitioner drinks the water and uses the water for sacred ceremonies such as *inipi*, as does
18 Deponent. Since Petitioner is an Intervenor in the ASLB proceedings and has been granted
19 standing in those proceedings, Petitioner will have standing to appeal any decision in the ASLB
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22 ¹¹ See, e.g., Section I.B. of the Order dated January 8, 2009 in ASLBP No. 08-867-02-OLA-BD01 noting
23 that the NRC safety report is expected by Summer/Fall 2009 and the environmental report is expected by
24 December 2009; meaning that litigation with respect to the issues therein will not occur until 2010 at the
25 earliest and that a final decision would be issued in the 2010-2011 timeframe leading to federal court
appeals in 2011-2012.

1 proceedings that is adverse to her, including any decision on the issues related to Arsenic and
2 Pancreatic Cancer.

3 (C) Petitioner wants to establish by the proposed testimony that: (1) Deponent
4 was born and raised at Slim Buttes and drank the water there, gardened with it, ate vegetables
5 from such gardens, used The White River, fished out of it, ate out of it, bathed in it and did the
6 same from the water at the well at Slim Buttes and from the tap once the Mni Wiconi water
7 project was connected to the tap at Petitioner's house at Slim Butte which she shares with
8 Deponent; (2) Deponent has a deteriorating health condition and all facts related to the
9 deterioration of Deponent's health, the development of diabetes and the development of
10 pancreatic cancer as well as all facts related thereto or which might tend to show a relationship
11 between the operations of the mine, exposure to Arsenic through use of and exposure to water
12 and to contaminants; (3) information concerning the sacredness of the water and ceremonial uses
13 of water by Deponent; and (4) any information that Deponent wants to put on the record that
14 may be relevant to any of the actions described in paragraph (B) above. The reasons to
15 perpetuate this testimony is that Deponent will likely not be available due to the terminal nature
16 of pancreatic cancer when the ASLB proceedings mature to the point where such testimony may
17 be heard. Further, it is likely that other proceedings will arise that are not governed by ASLB
18 rules and in which the testimony will be relevant. Since Deponent is the only known case of
19 pancreatic cancer at Slim Buttes to date and the only known case that can be traced to the link
20 between the mine's operations, releases of Arsenic, faults and fractures connecting the mined
21 aquifer to the Arikaree aquifer, contamination pathways along The White River which transects
22 Slim Buttes. Therefore, Deponent's testimony is unique, relevant and it is both urgent and
23 essential that it be perpetuated for use in pending and future legal proceedings.

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1 (D) The names and addresses of the persons the Petitioner expects to be adverse

2 parties and their addresses are as follows:

3 Crow Butte Resources, Inc.
4 86 Crow Butte Road
5 Crawford, NE 69339-1718

Office of the Secretary
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555
E-mail: Hearing.Docket@nrc.gov

6 Crow Butte Resources, Inc. (Headquarters)
7 Attn: Stephen P. Collings, President
8 141 Union Blvd., Suite 330
9 Lakewood, CO 80228
10 E-mail: steve_collings@cameco.com

Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555
Attn: Brett M.P. Klukan, Esq.
Brett.Klukan@nrc.gov

11 Counsel to Crow Butte:

12 Tyson R. Smith, Esq. **
13 Winston & Strawn LLP
14 1700 K St. NW
15 Washington, DC 20006
16 E-Mail: trsmith@winston.com

17 Other interested parties include the ASLB Panel of each of the pending NRC
18 administrative proceedings because under NRC regulations, the administrative judges are the
19 ones that propound questions on behalf of the parties and the proceeding.¹²

20 Judge Ann Marshall Young, Chair (ASLBP No. 07-859-03-MLA-BD01)
21 Atomic Safety and Licensing Board Panel
22 U. S. Nuclear Regulatory Commission
23 Washington, DC 20555-0001
24 E-Mail: Ann.Young@nrc.gov

25 Judge Michael M. Gibson, Chair (ASLBP No. 08-867-02-OLA-BD01)
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: mmg3@nrc.gov

Mrs. Johanna Thibault
Board Law Clerk
Atomic Safety and Licensing Board Panel

¹² See Subpart L of 10 CFR §2.1200 et seq.

1 U. S. Nuclear Regulatory Commission
2 Washington, DC 20555-0001
3 E-mail: Johanna.Thibault@nrc.gov

4 (E) The name, address and expected substance of the testimony of the
5 Deponent is as follows:

6 Aloysius Weasel Bear
7 POB _____
8 Pine Ridge, SD 57770

9 The substance of the testimony expected from this Deponent is that: (1)
10 Deponent was born and raised at Slim Buttes and drank the water there, gardened with it, ate
11 vegetables from such gardens, used The White River, fished out of it, ate out of it, bathed in it
12 and did the same from the water at the well at Slim Buttes and from the tap once the Mni Wiconi
13 water project was connected to the tap at Petitioner's house at Slim Butte which she shares with
14 Deponent; (2) Deponent has a deteriorating health condition and all facts related to the
15 deterioration of Deponent's health, the development of diabetes and the development of
16 pancreatic cancer as well as all facts related thereto or which might tend to show a relationship
17 between the operations of the mine, exposure to Arsenic through use of and exposure to water
18 and to contaminants; (3) information concerning the sacredness of the water and ceremonial uses
19 of water by Deponent; and (4) any information that Deponent wants to put on the record that
20 may be relevant to any of the actions described in paragraph (B) above. The reasons to
21 perpetuate this testimony is that Deponent will likely not be available due to the terminal nature
22 of pancreatic cancer when the ASLB proceedings mature to the point where such testimony may
23 be heard. Further, it is likely that other proceedings will arise that are not governed by ASLB
24 rules and in which the testimony will be relevant. Since Deponent is the only known case of
25 pancreatic cancer at Slim Buttes to date and the only known case that can be traced to the link
between the mine's operations, releases of Arsenic, faults and fractures connecting the mined

1 aquifer to the Arikaree aquifer, contamination pathways along The White River which transects
2 Slim Buttes. Therefore, Deponent's testimony is unique, relevant and it is both urgent and
3 essential that it be perpetuated for use in pending and future legal proceedings.

4 6. In conjunction with this Petition, Petitioner has also filed a Motion with both ASLB
5 Panels of the NRC seeking licensing board orders for the parties and counsels to attend the
6 deposition and have an opportunity to cross-examine the Deponent. Petitioner has also served a
7 copy of this Petition on each of the adverse and interested parties identified above. Due to the
8 exigent circumstances and fact that the ASLB in ASLBP No. 08-867-02-OLA-BD01 has asked
9 the parties to reserve March 24, 2009 for a possible hearing in Rapid City, SD so that the parties
10 have either reserved the date or expect to be in the region due to the case, Petitioner has sought
11 [and obtained] a waiver of service of process from each of the adverse parties and interested
12 parties listed in paragraph 6 above. Accordingly, Petitioner also seeks an Order waiving the 20
13 days' notice and service of process.

14 7. The Oglala Sioux Tribe has stated, through its counsel Elizabeth Lorina of the Law
15 Offices of Mario Gonzalez, that the Tribe does not object to the proposed Order authorizing the
16 deposition of Deponent.

17 8. Perpetuating Deponent's testimony would prevent a failure or delay of justice that would
18 happen if Deponent dies before being able to put his testimony into the record and because his
19 testimony is unique and directly related to the admitted contentions and possible claims related
20 thereto.

21 9. Since the parties and interested parties have had ample prior notice and have an
22 opportunity to cross-examine, Petitioner also seeks an Order that the deposition may be used in
23 any action in this Court or in any federal court.

24 **WHEREFORE**, Petitioner respectfully prays that this court issue an Order as follows:

25 a. Authorizing the deposition of Deponent to be taken as described above;

1 b. Waiving the requirement for 20 days' advance service of process in FRCP 4 and
2 under OST Court rules due to the actual service of process on the parties and exigent
3 circumstances;

4 c. Authorizing the deposition to be used in any action in this court and in any federal
5 court; and

6 d. Each party shall bear its own attorneys' fees and costs and court costs in this matter
7 shall be waived.

8 DATE: February __, 2009

Respectfully submitted,

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11 _____
12 David Frankel
13 Attorney for Petitioner
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

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Docket No. 40-8943

ASLBP No. 08-867-02-OLA-BD01

February 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that copies "INTERVENORS' MOTION RE: PERPETUATION OF TESTIMONY" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (**); on this 26th day of February, 2009:

Judge Michael M. Gibson, Chair **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: mmg3@nrc.gov

Judge Brian K. Hajek **
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-Mail: hajek.1@osu.edu; BHK3@nrc.gov

Judge Richard F. Cole **
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U. S. Nuclear Regulatory Commission
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Judge Alan S. Rosenthal **
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Atomic Safety and Licensing Board Panel
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Crow Butte Resources, Inc. **
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Respectfully submitted,

/s/ - electronically signed

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Nancy Greathead

From: David Cory Frankel [davidcoryfrankel@gmail.com]
Sent: Thursday, February 26, 2009 7:01 PM
To: Tom Ballanco; Johanna Thibault; Hearing Docket; ASLBP_HLW_Adjudication Resource; Elizabeth Lorina; Brett Klukan; trsmith@winston.com; shanecrobinson@gmail.com; OCAAMAIL Resource; arm.legal@gmail.com; Alan Rosenthal; rsnthl@verizon.net; Michael Gibson; Richard Cole; hajek.1@osu.edu; Marck McGuire; Secy; Bruce Ellison; Deb White Plume; Tom Cook; buffalobruce1@gmail.com; Monique Cesna; Shahram Ghasemian; BHK3@nrc.gov; Michael Gibson; Alan Rosenthal; Catherine Marco; lcarter@captionreporters.com; ejduncan@winston.com; Rebecca Giitter; Nancy Greathead; Emile Julian; Linda Lewis; Evangeline Ngbea; OGCMailCenter Resource; Christine Pierpoint; Matthew Rotman; Tom Ryan; csisco@winston.com; Shahram Ghasemian; Megan Wright; Johanna Thibault; Richard Cole; Brett Klukan; Megan Wright; Anthony Eitreim; nets@columbus.rr.com; Christine Jochim Boote; Nancy Greathead; Christine Jochim Boote; Emile Julian; mdmsjn@windstream.net; Tom Ryan; Alberto; Andrew Welkie; Anthony Eitreim
Subject: Transmitting Document in Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01
Attachments: Intervenor's Motion re Perpetuation of Testimony (Renewal) 02262009.pdf; Rule 27 Petition Draft 02262009.pdf; (Renewal) EIE conformed COS 02262009.pdf

Dear All,

Attached please find Intervenor's Motion re Perpetuation of Testimony, attached draft Rule 27 Petition and related COS.

Sincerely,

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Received: from mail2.nrc.gov (148.184.176.43) by TWMS01.nrc.gov
(148.184.200.145) with Microsoft SMTP Server id 8.1.291.1; Thu, 26 Feb 2009
19:02:12 -0500

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Received: by rv-out-0708.google.com with SMTP id k29so724410rvb.50 for
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Return-Path: <davidcoryfrankel@gmail.com>

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Date: Thu, 26 Feb 2009 14:01:22 -1000

Subject: Transmitting Document in Docket No. 40-8943 - ASLBP No.
08-867-02-OLA-BD01

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