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March 10, 2009 (9:00am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

1 AND BEFORE

2 LICENSE RENEWAL BOARD:

3 MICHAEL M. GIBSON, Administrative Judge

4 RICHARD F. COLE, Administrative Judge

5 BRIAN K. HAJEK, Administrative Judge

6
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1 P-R-O-C-E-E-D-I-N-G-S

2 10:04 a.m.

3 CHAIRPERSON YOUNG: This is Judge Young.

4 JUDGE GIBSON: Judge Gibson.

5 JUDGE OLIVER: This is Judge Fred Oliver
6 with of the ASLB Board.

7 JUDGE COLE: Judge Richard F. Cole.

8 JUDGE ROSENTHAL: Judge Rosenthal.

9 JUDGE HAJEK: Judge Hajek.

10 CHAIRPERSON YOUNG: And we have Johanna
11 Thibault also, our law clerk. Staff?

12 MR. KLUKAN: This is Brett Klukan for the
13 NRC Staff. I have with me Christine Jochim Boote also
14 for the NRC Staff and Catherine Marco for the NRC
15 Staff.

16 CHAIRPERSON YOUNG: Applicant?

17 MR. SMITH: This is Tyson Smith for the
18 Applicant. Emily Duncan is also on the phone as is
19 Mark McGuire.

20 CHAIRPERSON YOUNG: Intervenor?

21 MR. FRANKEL: David Frankel on the phone,
22 counsel for Intervenor and I do not believe any other
23 Intervenor's counsel for my client are on the phone.

24 CHAIRPERSON YOUNG: Mr. Robinson, you're
25 on, right?

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1 MR. ROBINSON: Yes, Shane Robinson is also
2 here.

3 MR. FRANKEL: Oh, I stand corrected.

4 CHAIRPERSON YOUNG: And then the Tribe?

5 MS. LORINA: Elizabeth Lorina for the
6 Oglala Sioux Tribe.

7 CHAIRPERSON YOUNG: And the Treaty
8 Council.

9 MR. BALLANCO: Tom Ballanco for the Olgala
10 Delegation of the Black Hills Sioux Nation Treaty
11 Council.

12 CHAIRPERSON YOUNG: Okay, I think that's
13 everyone. Just to help us move along more smoothly
14 and make it easier on the Court Reporter, could
15 everyone -- this is Judge Young, could everyone
16 identify yourself when you speak. We have a few
17 questions that we'd like to ask with regard to the
18 Motion to Perpetuate Testimony and then the License
19 Amendment Board have a few more questions about
20 scheduling issues and what process to adopt on the
21 Commission's ruling on our recommendations regarding
22 Subpart G.

23 I guess the main thing is how, as a
24 practical matter, to handle the issues related to the
25 Motion to Perpetuate Testimony. One, whether to

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1 proceed with an oral deposition or whether to do this
2 through paper filings. One question that has occurred
3 to us is what is the Staff's position and the
4 Applicant's position and anyone else who may have a
5 view on this, as to whether you would want to question
6 the witness in view of what Mr. Frankel has indicated
7 will be the substance of the witness' testimony?

8 Staff, do you want to -- what's your
9 intention on that?

10 MR. KLUKAN: The Staff, your Honor, would
11 like the opportunity to question the witness on the
12 proposed scope of testimony. With that said, we do
13 object or will object in our pleading today to Number
14 4, Item Number 4 in the proposed List of Testimony
15 issues that could be used in another Federal Court
16 proceeding. But as to the above three, in the
17 proposed scope of the testimony, the Staff would like
18 to be permitted to ask questions at the deposition or
19 would seek to ask questions.

20 CHAIRPERSON YOUNG: Applicant?

21 MR. SMITH: This is Tyson Smith for the
22 Applicant. Emily Duncan is also on the phone as is
23 Mark McGuire.

24 CHAIRPERSON YOUNG: Intervenor?

25 MR. SMITH: This is Tyson Smith for the

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1 Applicant. Emily Duncan is also on the phone as is
2 Mark McGuire.

3 CHAIRPERSON YOUNG: Intervenor?

4 MR. SMITH: This is Tyson Smith for the
5 Applicant. Emily Duncan is also on the phone as is
6 Mark McGuire.

7 CHAIRPERSON YOUNG: Intervenor?

8 MR. SMITH: This is Tyson Smith. I guess
9 first is, we'd like to insure that we have an
10 opportunity to respond to the motion in writing. We
11 do have some preliminary thoughts here today. I think
12 the first is, you know, there is no procedure in NRC
13 regulations to permit such a deposition and I think
14 that there is a procedure built in for taking written
15 testimony and we don't see a need to devolve to take
16 extraordinary measures doing oral depositions.

17 Beyond that, it's difficult for us to say
18 whether we would have any questions. We don't have
19 any information about Mr. Weasel Bear or the specifics
20 of what he proposes to testify to and it's difficult
21 for us to effectively prepare for such a deposition if
22 one were ordered and we don't have any information
23 about his medical condition or any of the specific
24 information he's going to testify to. Based on the
25 proposed scope of his testimony, it doesn't appear

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1 that much of it would be admissible or really relevant
2 to the NRC proceeding which is really focused on
3 compliance with NRC regulations, not on the health
4 effects of arsenic exposure.

5 CHAIRPERSON YOUNG: I think we can
6 probably assume from what both of you said that we
7 will be receiving and that you want to file written
8 responses to the motion itself rather than state all
9 your positions verbally simply now.

10 MR. KLUKAN: That -- this is Brett Klukan
11 for the NRC. That is correct, your Honor.

12 MR. SMITH: And Tyson Smith for Crow
13 Butte, yes, that's correct.

14 CHAIRPERSON YOUNG: And we're getting the
15 Staff's today and Mr. -- I think that's what you said,
16 Mr. Klukan, right?

17 MR. KLUKAN: Yes, your Honor. Again, this
18 is Brett Klukan. The Boards, both Boards will be
19 receiving that response today from the Staff.

20 CHAIRPERSON YOUNG: And Mr. Smith, when
21 were you planning to file yours? I can't recall what
22 the deadline would be.

23 MR. SMITH: Well, the deadline would be
24 Monday, March 9th and we'll endeavor to get it in
25 early if that would assist the Board, but I'm not sure

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1 the we're going to be able to do that. We've had some
2 other obligations this week in these proceedings that
3 we've been attending to.

4 CHAIRPERSON YOUNG: Before we get back to
5 the questions on this, I did have one other thing that
6 came to my mind earlier and then left it and that is
7 did we actually get a separate filing of this motion
8 for the License Amendment Board? I think there may
9 have been a question about that. Mr. Frankel, did
10 you file two motions or did you file one that was
11 addressed to both Boards?

12 MR. FRANKEL: Your Honor, David Frankel
13 for Intervenors. Yes, we filed two separate motions,
14 identical motions, almost identical, one with each
15 proceeding.

16 CHAIRPERSON YOUNG: So the one you filed
17 with us should say "license amendment" instead of
18 "licence renewal".

19 MR. FRANKEL: Yes, your Honor, I
20 apologize.

21 CHAIRPERSON YOUNG: Okay, I just wanted to
22 clarify because I wasn't sure and I wanted to make
23 sure the right thing was in the record. Okay, Mr.
24 Frankel, could you speak to the issue of timing of
25 this, taking into account the condition of the witness

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1 and the doctor's prognosis with regard to your request
2 to do an oral deposition as opposed to paper testimony
3 with responses on paper and then should the Board have
4 any questions, written questions. Can you speak to
5 those issues?

6 MR. FRANKEL: Yes, your Honor, David
7 Frankel for Intervenors. I spoke with the witness on
8 Sunday and he's in great pain. He has been diagnosis
9 with pancreatic cancer. He has not yet undertaken the
10 radiation or chemo treatments, but he's not keeping
11 down food. He's in great pain and in between the time
12 of when I was made aware of the cancer and started
13 preparing this motion and this past Sunday, in between
14 that time, I feel that his health condition has become
15 extremely erratic.

16 He -- if his preference were to be taken
17 into consideration, it would be to do as much as
18 possible on the papers and if there were to be a
19 deposition, we would probably plan on a very, sort of
20 a focused one due to his health condition. If --
21 let's see, I'm not sure what else I can add except
22 timing is urgent. I have prepared an affidavit for
23 that witness which could be the basis for specific
24 written submissions, questions to be proposed or
25 propounded, et cetera.

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1 I would not be confident that in six weeks
2 we would have the same level of availability just
3 based on my layman's observations of his mind set and
4 condition, just talking with him on the phone, and
5 really not have spoken with his doctors.

6 CHAIRPERSON YOUNG: Based on what you're
7 saying -- this is Judge Young. Based on what you're
8 saying, let me throw out my reading of that and get
9 the parties' responses to that. I sounds as though
10 since your witness would prefer to do it in writing,
11 that might be easier on him. The most practical way
12 to proceed might be to have you submit your testimony
13 relatively quickly in writing and the set a relatively
14 short deadline for the Staff and Applicant to prepare
15 any written questions and then follow it up by a
16 relatively short time period for those questions to be
17 responded to, provide time after that for any rebuttal
18 questions and any questions by the Board and try to do
19 that in very short increments of time.

20 And given that, it sounds as though, and
21 maybe I'm being overly optimistic, but it sounds as
22 though all the parties might be in agreement with
23 that.

24 MR. FRANKEL: David Frankel, again, your
25 Honor. We might be and I want to also state on the

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1 record that both NRC Staff counsel and Applicant
2 counsel have been cooperative in talking through this
3 issue which we all acknowledge is complicated and
4 difficult. So to the extent that I can modify our
5 approach as long as we're able to perpetuate the
6 testimony that we feel is key and relevant, we'll be
7 flexible. So I feel like there has been some give and
8 take thus far and I've dropped parts of the proposal
9 that seemed to me resistant and I'd be willing to keep
10 doing that to facilitate an orderly and proper
11 procedurally correct presentation of the issue.

12 CHAIRPERSON YOUNG: I neglected to mention
13 the Tribe and the Treaty Council in -- are either of
14 you going to want to prepare any questions to the
15 witness?

16 MS. LORINA: Elizabeth Lorina for the
17 Tribe. No, we don't plan to and we don't object to
18 what Mr. Frankel's proposing on his end.

19 CHAIRPERSON YOUNG: And Mr. Ballanco?

20 MR. BALLANCO: Tom Ballanco for the Olgala
21 delegation, at this time I wouldn't expect any
22 questions but we may change that particularly if this
23 does go to writing. I would point out on behalf of
24 the Treaty Council certainly the interest of this
25 tribal member are paramount as far as what is the

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1 preferable method for this person who is, you know,
2 suffering this disease. But it is certainly the
3 strongly advanced position of the Treaty Council that
4 Mr. Weasel Bear, who is a native Lakota language
5 speaker, there is something very present and
6 appropriate about expression in person in that
7 language with a translator. Mr. Weasel Bear is
8 certainly fluent in English and particularly
9 articulate in both languages, but to the extent that
10 it would be his desire to express himself on the
11 record orally, the Treaty Council certainly wants to
12 acknowledge that, if that is in fact, the case and we
13 would strongly support his opportunity to do that is
14 that was his desire.

15 CHAIRPERSON YOUNG: But it sounds as
16 though it's not and if anything should arise later
17 then, obviously, anyone could raise it, but it sounds
18 as though base on what Mr. Frankel has said that we
19 may be able to proceed in a way that everyone could go
20 along with. We haven't heard from the staff or the
21 Applicant. Based on what you've heard, how does that
22 approach sound to you? And either one of you can go
23 first. Staff, if you want to.

24 MR. KLUKAN: Your Honor, this is Brett
25 Klukan. I mean, from what Mr. Frankel has stated, I

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1 mean, we see that process could work just as we see
2 the deposition process could work. I mean, really we
3 want to be amenable to whatever process would best fit
4 the deponent, so to speak, given in light of his
5 condition and what will work best for him.

6 So yes, we could see the written process
7 working. I mean, we wouldn't have an objection to
8 doing it that way.

9 CHAIRPERSON YOUNG: And Mr. Smith, what
10 would be your response? And also, would you still
11 want to file a response to the motion in view of what
12 Mr. Frankel has said?

13 MR. SMITH: A couple of things; I think
14 first that the process using written testimony and
15 questions that is generally acceptable to us. That is
16 the process that's in the NRC regulations for this
17 kind of proceeding. I think a couple of important
18 questions; we, of course, would reserve the right to
19 object to the admissibility or the relevance of any
20 information that's developed of these written
21 questions at a later point in time, when it came time
22 for the hearing.

23 And you know, we'd also, you know, point
24 out that we still aren't going to have -- we don't
25 have currently the information that's necessary for us

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1 to effectively ask questions of Mr. Weasel Bear. We
2 don't have any information regarding his medical
3 condition or his medical history or any of the basis
4 for some of the opinion that he wants to give
5 according to the scope of the deposition and the
6 motion regarding a link between his water in Crow
7 Butte. You know, we don't have any information from
8 the Intervenors on that.

9 So it's difficult for us to say that we
10 can, you know, conduct an effective questioning at
11 this point in time, but again, as we said, we're open
12 to a written process and an expedited time frame
13 subject to the limitations that we have an opportunity
14 to object later as appropriate.

15 CHAIRPERSON YOUNG: Obviously, any
16 objections would be preserved. Mr. Frankel, could you
17 -- if we proceed in this way, could you attach to the
18 written testimony any relevant medical information
19 that would provide what Mr. Smith is indicating his
20 party would like to have?

21 MR. FRANKEL: David Frankel for
22 Intervenors, your Honor, I feel like it would be a
23 relatively simple matter to get a confirmatory letter
24 from the deponent's medical doctor confirming that he
25 has been diagnosed with pancreatic cancer. I feel

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1 that beyond that or beyond obtaining a copy of his
2 medical record which might be voluminous and I might
3 not be able to submit in a very short time frame, I'm
4 not sure whether I can comply with what Applicant is
5 looking for because quite frankly, Applicant's
6 counsel's statement of what they are looking for
7 sounds broad to me and I wouldn't know whether I could
8 completely satisfy what they are looking for.

9 CHAIRPERSON YOUNG: But at least if you
10 provide whatever you could provide, that would provide
11 a basis for going forward and getting some response
12 questions and in which any further information that
13 was desired could be expressed in those questions. It
14 sounds like that -- does that make sense to you, Mr.
15 Smith?

16 MR. SMITH: Yeah, I think that's a start.
17 I mean, I would note that, you know, he's -- Mr.
18 Weasel Bear is going to discuss a link between the
19 mine's operation and the White River and we don't have
20 any information that suggests there to be a link and
21 I'm not sure what Mr. Weasel Bear is going to have to
22 testify with respect to that. I don't know what basis
23 he would have for that testimony.

24 MR. FRANKEL: This is David Frankel, your
25 Honor, if I might. David Frankel for the Intervenor.

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1 The part of the link that he would testify to would be
2 the part having to do with his use of water from the
3 Slim Buttes (phonetic) Well before it was capped and
4 the use of the White River.

5 CHAIRPERSON YOUNG: Before it was? Before
6 it was?

7 MR. FRANKEL: His use of the Slim Buttes
8 Well before the well was capped.

9 CHAIRPERSON YOUNG: Capped, c-a-p-p-e-d?

10 MR. FRANKEL: Yes, yes, your Honor. And
11 his use of the White River. And he would only be able
12 to testify to those parts which are of his own
13 knowledge and, of course, as a lawyer, it's my job to
14 at some point, integrate that testimony with the rest
15 of our argument.

16 JUDGE GIBSON: But it does seem to me that
17 you're not -- that we're talking about like three
18 separate issues here. One of them has to do with his
19 use of the water, contact with the water, which I
20 assume is going to be in the testimony, not in any of
21 these medical records.

22 The second thing we're talking about here
23 is what is his medical conditions and what records
24 reflect that medical condition. And you know, this is
25 one of those things if you want to put that in

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1 evidence, okay, then counsel for the Applicant and
2 Staff may have an objection with respect to relevance
3 on the one hand and they also may have another
4 objection that you know, they were unable to adduce
5 the necessary testimony from this witness whether it's
6 through deposition or through cross-question these
7 written questions because they didn't have that
8 information.

9 So you know, in order to elicit those
10 questions from him, you're going to need to provide
11 that information. If you don't, then, you know, it
12 may end up presenting a problem for you down the road.
13 But it does seem to me that this is something that we
14 have to move expeditiously on and while it may pose
15 some difficulty for you, Mr. Frankel, in the long run,
16 providing this information is going to be to your
17 benefit because if it's not produced to them before
18 this particular person may die, then there won't be
19 the possibility of adducing the testimony.

20 So again, I just -- I think this is one of
21 those things where, you know, you have to put this in
22 a larger context and I'm sure you're doing what you
23 can. It sounds to me like the parties are working
24 very hard and I forgot to -- Ann just noted -- Judge
25 Young just noted for me that I forgot to say that this

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1 is Judge Gibson before I started talking. I'm sorry
2 about that.

3 So anyway it just seems to me that that's
4 where we are. It seems to me that the written
5 proposals you all have talked about are something you
6 all can promptly agree do. I would certainly
7 encourage you all to work this out among yourselves
8 and to try to minimize the necessity of having, you
9 know, the Board be involved. The one thing we are
10 going to do, though, is we're going to need to set
11 some specific deadlines here because we certainly do
12 not want to have this particular person end up dying
13 before this testimony could be perpetuated in whatever
14 format it is.

15 And I think we do need to make sure that
16 that happens. So that's all -- I've said my piece.
17 I just want to be sure that all the parties are clear
18 about what my views are on this.

19 CHAIRPERSON YOUNG: Could I just add, we
20 could either all together now set some time lines for
21 the filing of the initial testimony, the filing of the
22 questions from the rest of the parties and response to
23 that, the filing of the answers to those questions
24 along with any rebuttal testimony, et cetera.

25 We could do that together now if there was

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1 no objection or all of you could get together and try
2 to work out those time lines together and then notify
3 us of what you have worked out. How do the parties
4 feel about that? What do you think would be
5 reasonable to expect and assuming that we proceed in
6 either way, can we assume that -- well, first of all,
7 obviously, all objections would be preserved but
8 taking that as an underlying assumption, would all the
9 parties be in agreement to proceeding in either of
10 those ways to set time times or deadlines without the
11 need for any further filings on the motion itself?

12 JUDGE ROSENTHAL: Before -- this is Judge
13 Rosenthal. Before you all answer the question that's
14 been proposed by Judge Young, I would just like to
15 make a passing observation. It seems to me that this
16 is a matter that readily can be worked out by the
17 parties themselves without further intervention by the
18 Board. It's obvious what the ultimate objective is
19 which is to insure that the testimony of this witness,
20 who is critically ill, is preserved with the ability
21 of the opposing counsel to question him on any aspect
22 of the testimony that they feel is subject to further
23 inquiry. I don't see this is a matter that involves
24 rocket science at all and I would be hopeful that your
25 response to Judge Young would be to the effect that

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1 the parties, indeed, can work this out themselves with
2 the common objective in mind without this Board having
3 to involve itself further. So that's just the way I
4 see it and I'm hopeful that the parties will see it in
5 the same light.

6 MR. FRANKEL: David Frankel for
7 Intervenors. If I might just give my indication.
8 Yes, Judges, I am confident we can work it out without
9 further intervention by the Board. I'm hopeful that
10 we can do that, number one. Number two, I'm sure that
11 in a short period of time, I can get confirmatory
12 letters and to respond to Judge Gibson's statement
13 which I appreciate that and it would be my intention
14 to provide as much substantive information to my
15 opposing parties to that they can formulate self-
16 questions and have proper opportunity.

17 I'd be able to meet with the deponent's
18 doctor by the end of this month. So to the extent
19 that I could possibly make an easy -- I'm not sure of
20 what time frame people are considering but I just want
21 to put out there that I can do only so much by phone
22 and fax. But when I get onsite which will be in the
23 third week of March, some time between the 21st and
24 26th, I can provide a more detailed file, a copy of
25 the relevant papers and I would like the opportunity

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1 to do that. So depending on how expedited things are,
2 I may need to make a submission and a supplemental
3 submission which contains more detailed medical
4 records when I've had a chance to review those and
5 organize them. Thank you.

6 JUDGE ROSENTHAL: Mr. Frankel, this is
7 Judge Rosenthal again. Have you gotten any idea with
8 respect to what the current life expectancy of your
9 witness is? I mean, is death as you understand it, or
10 maybe you have no information, imminent in which case
11 two or three weeks from now might be too late. I
12 mean, pancreatic cancer, I gather, is regarded as
13 rather rapidly moving. On the other hand, this might
14 be a matter, given his current condition of three
15 months or it might be a matter of two weeks or even
16 less than that.

17 MR. FRANKEL: Yes, your Honor, David
18 Frankel for Intervenors. I believe that he's going to
19 a doctor's appointment within the next week at which
20 time he'll be making a decision as to whether to
21 pursue invasive or what might be considered invasive
22 radiation and chemotherapy treatments or whether he
23 may make a decision not to do that and I feel like
24 it's probable that his expectancy will be majorly
25 effected by that decision. It is not -- I do not

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1 believe that it was so-called caught early and I
2 believe Mr. Ballanco spoke to this deponent in person
3 more recently than I and heard something to the effect
4 that it was an optimistic hope that he might make it
5 through June.

6 MR. BALLANCO: This is Tom Ballanco for
7 the Oglala Delegation. And I did speak directly to
8 this deponent some weeks ago. And at that point he'd
9 indicated receiving a general diagnosis some time in
10 October of approximately, you know, nine months but
11 the doctor also indicated that that is by no means a
12 certainty or a guarantee. It is an extremely
13 aggressive cancer and at the same time, miracles have
14 been known to happen, but a very small percentage of
15 people diagnosed with pancreatic cancer, particularly
16 at the time when Mr. Weasel Bear was diagnosed, are
17 still living within a year after that diagnosis. So
18 we're looking at the summer at the outset would be,
19 you know, a full year from diagnosis.

20 JUDGE OLIVER: This is Judge Fred Oliver.
21 What is his age?

22 MR. FRANKEL: I believe -- David Frankel
23 speaking. I believe he's about 40.

24 JUDGE OLIVER: Okay. Thank you.

25 CHAIRPERSON YOUNG: In view of what Mr.

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1 Frankel said, can we hear from the other parties as to
2 whether you think you can work together to come up
3 with a schedule that would take into account the
4 urgency issues, the timing issues, as well as Mr.
5 Frankel's providing some information and then
6 supplementing it later? Do you think you can work
7 together on that and then come back to us with a
8 schedule or do you think you're going to need us to
9 work with you on that?

10 MR. KLUKAN: Your Honor, this is Brett
11 Klukan for the NRC Staff. I think we can definitely
12 work with Intervenors in developing a new agreement in
13 light of some clarifying questions we were going to
14 pose in our response today and come up with a proposed
15 schedule. I don't think Board intervention is
16 necessary in the development of either.

17 I would say though because that, we -- you
18 shouldn't expect to see a filing or response from us
19 today in light that we are going to go back and work
20 these things out.

21 MR. SMITH: This is Tyson Smith for the
22 Applicant. As long as we're talking about written
23 questions and not an oral deposition, which it sounds
24 like that's what we're talking about here, I think we
25 can definitely work with Intervenors to come up with

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1 a time frame that works for everyone on this.

2 CHAIRPERSON YOUNG: And Judge Gibson wants
3 to ask one more thing, but just, can we assume then
4 that the parties will proposed to us an agreed order
5 resolving issues raised in the motion and also
6 including a schedule for providing the testimony and
7 questions and responses and so forth?

8 MR. FRANKEL: David Frankel for
9 Intervenors. Yes, your Honor.

10 CHAIRPERSON YOUNG: Mr. Klukan and Mr.
11 Smith?

12 MR. KLUKAN: Your Honor, this is Mr.
13 Klukan. That is completely what I was envisioning us
14 doing.

15 MR. SMITH: This is Tyson Smith. Yes.

16 CHAIRPERSON YOUNG: I'm assuming that the
17 Tribe and the Treaty Council agree with that.

18 MS. LORINA: Elizabeth Lorina, yes, your
19 Honor.

20 MR. BALLANCO: Tom Ballanco, yes, your
21 Honor.

22 CHAIRPERSON YOUNG: Great.

23 JUDGE GIBSON: Okay, I know that Judge
24 Young wants to cover a couple of other issues with you
25 with respect to -- this is Judge Gibson again. I'm

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1 sure glad that Judge Young is here to keep me in line.

2 CHAIRPERSON YOUNG: I probably didn't
3 identify myself either.

4 JUDGE GIBSON: With respect to -- Judge
5 Young has a number of matters she's going to want to
6 take up with you all with respect to the amendment
7 proceeding, but I have one other issue that I want to
8 get some clarity on and my understanding is that there
9 has been an agreed protective order that has been
10 reached between the parties. I just want confirmation
11 of that and that everything is going smoothly with
12 respect to disclosures and you all are not
13 anticipating any necessity of Board intervention in
14 that regard.

15 MR. FRANKEL: David Frankel for
16 Intervenors, yes, your Honor.

17 JUDGE GIBSON: Staff?

18 MR. SMITH: Yes, this is Tyson Smith for
19 the Applicant. Yes, Judge, we did submit a proposed
20 protective order to the Board, I guess it would have
21 been late last week.

22 JUDGE GIBSON: Right.

23 MR. SMITH: Yes, we all worked together
24 and that was agreed upon by all the parties.

25 JUDGE GIBSON: Okay.

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1 MR. SMITH: I'm not expecting any problems
2 at this time.

3 MR. KLUKAN: Your Honor, this is Brett
4 Klukan from the NRC Staff. As to the first, we agreed
5 to the protective order, that completely reflects our
6 agreement, that was submitted by counsel for the
7 Applicant. And as to the second question, we don't
8 foresee any need for Board intervention in the
9 disclosure process.

10 JUDGE GIBSON: And I take it the other
11 parties are in agreement as well.

12 MS. LORINA: Elizabeth Lorina, yes, your
13 Honor.

14 MR. BALLANCO: Tom Ballanco, yes, your
15 Honor.

16 JUDGE GIBSON: Okay. Well, then do you
17 all need us to approve that order before the -- before
18 we get there in Rapid City at the end of the month?

19 MR. KLUKAN: Your Honor, this is Brett
20 Klukan for the NRC Staff. Along with the protective
21 order we also submitted an agreement to modify the
22 provisions of the disclosure requirement, one of those
23 provisions including a 30-day extension from the 14-
24 day usual cycle, so that would fall before the time we
25 would have to go out to Rapid City.

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1 So not to impose any obligations upon the
2 Board, but if the Board were to do that before the
3 next cycle, it would greatly help move this process
4 along.

5 JUDGE GIBSON: I assure you, Mr. Klukan,
6 that that is something I do not consider an undue
7 burden on the Board, so we will make sure it's okay,
8 and get that thing signed and out.

9 MR. FRANKEL: David Frankel for
10 Intervenors, your Honor. If I might ask the Renewal
11 Board what your intentions are concerning March 24th
12 that you had us reserve.

13 JUDGE GIBSON: Well, we're going to be
14 talking about the issues that have been raised in the
15 briefs.

16 MR. SMITH: This is Tyson Smith for the
17 Applicant. I guess so are you saying that there will
18 be a hearing? It's my understanding that there was
19 still some question as to whether there was a need for
20 a hearing based on the briefs we filed so far. It
21 didn't seem like there was really much that required
22 an in-person oral argument as opposed to you know,
23 something on the briefs or, perhaps, even another
24 phone call?

25 JUDGE GIBSON: No, I think we need to have

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1 oral argument with respect to the issues that have
2 been raised in those briefs and we plan to go forward
3 with that.

4 MR. FRANKEL: David Frankel for
5 Intervenors. So just so I'm clear, your Honor, I'm
6 going to be making my travel arrangements.

7 JUDGE GIBSON: Yes.

8 MR. FRANKEL: Yes, thank you, your Honor.

9 MR. SMITH: And this is Tyson Smith for
10 the Applicant. Will there be some indication from the
11 Board what types of issues that you're going to have
12 questions on? Obviously, if we're talking about Rapid
13 City, then we need to make sure that we have the right
14 people from the site available. That's a, you know,
15 a day-long trip for them. I want to make sure that I
16 have the appropriate people there, so it would be
17 helpful if we had some --

18 JUDGE ROSENTHAL: This is -- I assume that
19 if you have an argument in a Federal Court of Appeals
20 you do not get advanced word as to what specific
21 questions you're going to be asked. I think it's fair
22 to say that the questions that will be posed will be
23 those that are suggested to the Board by the briefs,
24 the written briefs that have been filed. In other
25 words, this ought to be treated -- this is Judge

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1 Rosenthal, I don't know whether I identified myself at
2 the outset or not.

3 But this should be treated just as you
4 would treat an oral argument out in the Ninth Circuit.
5 So it's my understanding that the Board does not
6 intend to provide any questions in advance but will
7 expect counsel to be prepared as they would be in an
8 argument, again, in the Federal Court of Appeals to
9 address any questions that the Board might have with
10 relation to this issue as it's been developed in the
11 briefs of the respective parties.

12 MR. SMITH: Thank you, that's very
13 helpful. I just wanted to make sure we weren't
14 planning on having witnesses, questions or anything
15 like that. We're talking about legal arguments and
16 the stuff that's been presented so far, that is
17 perfectly fine. Thank you.

18 JUDGE ROSENTHAL: This is Judge Rosenthal
19 again. This is an oral argument, not an evidentiary
20 hearing and we see no necessity for anybody being
21 present, at least in an active role, other than
22 counsel for the respective parties.

23 JUDGE GIBSON: Okay, if there is nothing
24 further that any of you all need of the Renewal Board,
25 Judge Rosenthal and I are going to bow out because I

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1 have got another meeting and you all can meet with
2 your issues with respect to the Amendment Board, okay?
3 Thank you.

4 CHAIRPERSON YOUNG: Thank you. Okay, the
5 main issues that we wanted to talk about with respect
6 to the Amendment Board have to do with two things.
7 One, earlier we had granted Applicant's unopposed
8 motion for stay of disclosure obligations and we had
9 said that 30 days after we set the -- which process we
10 were going to follow, we would -- we said that the
11 stay would end unless the Board otherwise ordered or
12 unless the Commission issued any decision that would
13 have an effect on that.

14 Obviously, in our most recent order, we
15 recommended to the Commission that they order Subpart
16 G procedures for this and we have not yet received any
17 indication from the Commission on what they're going
18 to do. At this point, I guess we would like to one,
19 hear from the Staff on where you are with regard to
20 issuance of the Safety Environmental Documents, what
21 the parties' suggestions are regarding the schedule
22 for the proceeding and pose the possibility of
23 starting things moving again under Subpart L unless
24 and until the Commission were to order that the
25 proceeding be conducted under Subpart G.

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1 So I think that's the first and the main
2 thing that we wanted to get the parties' reactions on.
3 We don't want to let this sit and then have to hurry
4 up and catch up later on. So could we hear from all
5 of you on that?

6 MR. FRANKEL: David Frankel for
7 Intervenors, your Honor, thank you. Tyson and I spoke
8 about this about a week ago on the eve of when their
9 disclosures would have been due and I believe we have
10 a confirming e-mail with Mr. Klukan as well. Just
11 that we -- at least where we are right now, not
12 knowing how long the Commission might take to rule, we
13 had thought that we would be waiting, that the stay
14 would stay in effect for some period of time to give
15 them an opportunity to act on the Board's
16 recommendation but that if any of the parties got
17 uncomfortable with that, after a moderate period of
18 time, say 30 or 40 days that we could then, you know,
19 request that the stay be lifted.

20 And I'm open to anything that works for
21 the parties and the Board in this regard, but that's
22 where we are as of right now.

23 CHAIRPERSON YOUNG: And could we hear from
24 the Staff and Applicant and the Tribe and Treaty
25 Council as well on whether you're all in agreement

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1 with what Mr. Frankel says? I guess our main interest
2 is that we don't want to let it languish if there are
3 things that the parties could be doing, and obviously,
4 the Staff's schedule for issuance of the Safety and
5 Environmental Documents may as well play into that,
6 but let's go to Staff next and then the Applicant and
7 then the rest.

8 MR. KLUKAN: Your Honor, this is Brett
9 Klukan for the NRC Staff. I apologize, I don't have
10 project management with me, so I don't know the
11 specific schedule, but as far as I'm aware, your
12 Honor, it really closely coincide with the respective
13 dates in the renewal proceeding. So the Safety or the
14 Technical Evaluation Report should be some time in the
15 late summer and then the Environmental Report in
16 whatever form that may take of an EA or EIS, around
17 December of this coming year, of this year, excuse me,
18 so December 2009.

19 CHAIRPERSON YOUNG: So that sounds as
20 though that's moved forward a little bit which
21 indicates that this whole proceeding would move
22 forward in terms of the schedule a little bit. In
23 terms of what Mr. Frankel said about maintaining the
24 stay at least for another 30 days or so to see what
25 the Commission does, are you in agreement with that

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1 and I guess one other thing. I understand that the
2 Renewal Board is getting status reports on what the --
3 where the Staff is on the production of those
4 documents and whether they anticipate the same dates
5 to stay in effect or whether there's any change in
6 that. I'm assuming that none of you would disagree
7 with the Staff providing those to our Board as well
8 and you could do it on the same schedule for that
9 matter as you're doing it for the Renewal Board.

10 But are you in agreement with Mr. Frankel
11 on letting the stay remain in effect for at least
12 another 30 days or so?

13 MR. KLUKAN: I am, your Honor. I don't
14 see any issue with that and I think it would give the
15 Commission at least time if they are going to come out
16 with a quick decision to allow that to take place.
17 Actually, the other matter you mentioned, the Staff
18 will gladly provide status reports to the North Term
19 (phonetic) Board on the same schedule as it does to
20 the Renewal Board regarding the status or the schedule
21 status for those two documents.

22 CHAIRPERSON YOUNG: Mr. Smith, you were
23 the one who made the motion or your party was the one
24 who made the original motion to stay the discovery
25 obligations. I guess, am I correct in assuming that

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1 you were in agreement with Mr. Frankel's assessment?

2 MR. SMITH: Yes, I believe we also can
3 make sure we're on the same page with respect to that
4 and that's perfectly fine with us and that means
5 frankly, there are no documents at this point that we
6 haven't already produced in the license renewal
7 proceeding that would be produced in North Term
8 proceeding so from our perspective there's really not
9 much difference in doing those disclosures at any
10 point going forward. So certainly just for the
11 administrative burden alone, we're perfectly happy to
12 wait another month or two and see if we hear from the
13 Commission.

14 CHAIRPERSON YOUNG: All right, well then,
15 why don't -- if the Staff counsel could send us the
16 same reports on the same schedule, and you will need
17 to send separate ones just so that they'll get put
18 into the EIE and hearing docket and all the electronic
19 things that go with that so that they'll be put in
20 those things with regard to both cases.

21 MR. SMITH: Judge Young, this is Tyson
22 Smith for the Applicant. I just wanted to add,
23 whenever we do get to the disclosure point, that I
24 suspect that we will do -- as in the Renewal
25 proceeding we will have a proposed Joint Protective

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1 Order for you and hopefully we can also reach another
2 agreement among the parties with respect to some
3 protocol regarding the content of that disclosure,
4 just a heads up so you know that that will probably be
5 coming at some point.

6 CHAIRPERSON YOUNG: That was my next
7 question, so you've answered it. So it sounds as
8 though everything is moving along as it should be at
9 this point. The only new thing would be that we would
10 start getting the status reports from the Staff and in
11 a month or so, it might be good if the parties could
12 also report to us if we have not yet heard from the
13 Commission on what you want to do in terms of
14 maintaining the stay for a longer period or setting
15 another telephone conference to discuss where we are.

16 So maybe what we can do is just issue a
17 short order confirming this information that we've
18 discussed today and that the next things we will
19 expect will be the Staff's status reports and then
20 unless the Commission has ruled earlier, in 30 days
21 for the parties to file a joint report, a motion,
22 whatever is appropriate at that time, with regard to
23 whether to maintain the stay in effect an additional
24 time period or requesting a telephone conference to
25 start discussing a schedule for the case.

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1 Does that make sense, everyone, and is
2 there anything that any of you would like to address
3 before we end this conference? Everyone in agreement
4 with my summary?

5 MR. KLUKAN: This is Brett Klukan for the
6 NRC Staff. Yes, your Honor.

7 MR. SMITH: This is Tyson Smith for the
8 Applicant. Yes, your Honor.

9 CHAIRPERSON YOUNG: Mr. Frankel?

10 MR. FRANKEL: Yes, your Honor, David
11 Frankel. Thank you, your Honor.

12 CHAIRPERSON YOUNG: And Mr. Lorina?

13 MS. LORINA: Yes, your Honor.

14 CHAIRPERSON YOUNG: Mr. Ballanco?

15 MR. BALLANCO: Yes, your Honor, we're in
16 agreement.

17 CHAIRPERSON YOUNG: Very good. Thank you.
18 It's nice talking with you all. And does the Court
19 Reporter need to ask any of us any spelling questions?
20 If so, we'll remain for that. Otherwise, we're going
21 of the record at this point.

22 (Whereupon, at 10:54 a.m., the above-
23 entitled matter concluded.)

24

25

CERTIFICATE

This is to certify that the attached proceedings
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in the matter of: Crow Butte

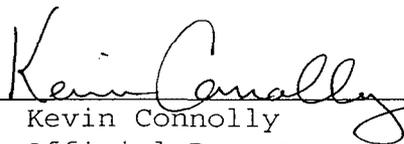
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Docket Number: 40-8943;

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

Location: (telephone conference)

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Kevin Connolly
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