

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

Before Administrative Judges:

Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred Oliver

In the Matter of CROW BUTTE RESOURCES, INC. (License Amendment for the North Trend Expansion Project)
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Docket No. 40-8943

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

November 5, 2009

ORDER
(Schedule for Proceeding; Telephone Status Conference)

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I. Background and Introduction

This proceeding concerns the Application of Crow Butte Resources, Inc. (CBR, Crow Butte, Crow Butte Resources, or Applicant), to amend its operating license for its in-situ leach (ISL) uranium recovery facility in Crawford, Dawes County, Nebraska,¹ to permit development of additional ISL uranium mining resources in a nearby location. Intervenors Western Nebraska Resources Council (WNRC), Debra White Plume, and Owe Aku/Bring Back the Way (Owe Aku) have challenged the Application, and the Oglala Sioux Tribe and Black Hills/Oglala Delegation of the Great Sioux Nation Treaty Council are also participating in the proceeding under 10 C.F.R. § 2.315(c). In CLI-09-12, the Commission limited the contentions to be litigated in the proceeding to the following (absent admission of any additional contentions hereafter):

Contention A

Subpart A1 (technical): Crow Butte’s proposed expansion of mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

Basis: Crow Butte has not established the Brule formation as a confining layer in that Crow Butte acknowledges that the Brule conducts water at 25 ft/day; that there may be more saturated areas; and that fracturing may be present (e.g., by the observed tectonic movements or earthquakes).

Basis: Crow Butte has not established the continuity of the Pierre as a lower confining unit.

Basis: Crow Butte has not shown that the White River fault, tectonic movements and/or nearby drilling of other wells will not cause increased movement of water between the aquifers. Crow Butte has not shown that the White River fault will not cause communication between the mined aquifer and the overlying aquifer and the White River.

¹ Source Materials License, SUA-1534.

Subpart A2 (environmental): Crow Butte's License Amendment Application does not accurately describe the environment affected by its proposed mining operations or the extent of its impact on the environment as a result of its use and potential contamination of water resources, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

Basis: The application does not take into consideration current and future domestic use of water from the Basal Chadron in the area surrounding the NTEA.²

On August 14, the parties filed a proposed schedule for this proceeding, as directed in a July 8, 2009, Order.³ Based on the input we have received from the parties, the regulatory requirements, and the nature and circumstances of this case, the Board now issues this scheduling order, which addresses timelines for litigating the above Contention A, Subparts A1 and A2, and any subsequently-admitted contentions. As the dates for the NRC Staff's issuance of its final environmental and safety documents are finalized, and after appropriate further consultation with the parties, any needed modifications will be made and a schedule containing actual dates will be issued.

II. Schedule

In addition to applicable general and other relevant provisions of 10 C.F.R. Part 2,⁴ the following schedule and related provisions will govern this proceeding, except as modified for good cause in future Board issuances.

A. Telephone Status Conference. On December 1, 2009, the Board will hold a status conference, by telephone conference call, to address scheduling and other appropriate matters, including any necessary modifications to the following timelines and requirements. Prior to that

² *Crow Butte Res., Inc.* (North Trend Expansion Area), CLI-09-12, 69 NRC __, __ (slip op. at 36-37) (June 25, 2009).

³ Licensing Board Order (Confirming Matters Addressed at July 7, 2009, Scheduling Conference) (July 8, 2009) at 1 (unpublished).

⁴ The parties should familiarize themselves with these rules and all requirements contained therein, and be aware that in some instances deadlines specified in Part 2 are modified herein. See, e.g., 10 C.F.R. §§ 2.307(a), 2.319(k).

date, the Board will provide information on how to connect in to this conference, and any specific matters the parties should be prepared to address during or before the conference. If any party will not be available on December 1, that party shall contact the other parties and ascertain other dates in early December (other than December 2-4) when all parties will be available, and provide the Board with this information no later than November 16, 2009.

B. Mandatory Disclosures and Hearing File; Time Requirements on Updates. Except as otherwise stated herein or in subsequent orders, the Board accepts and adopts the Agreement of the Parties Regarding Mandatory Disclosures, submitted on July 14, 2009.⁵ The parties agreed to provide disclosure updates on the 1st of every month. The NRC Staff provided its first submission of a hearing file on July 31, 2009,⁶ and has filed monthly updates since that time. The parties shall continue to provide updates by the 1st day of each month, keeping to the same schedule until issuance of the final environmental review document or final Safety Evaluation Report (SER), whichever occurs later. *Thereafter, updates shall be provided on the 1st and 15th day of each month, until two weeks prior to the deadline for filing of initial statements of position, at which point updates shall be filed on a weekly basis until the week before the commencement of the hearing, and thereafter on a daily basis until the close of the hearing. The responsibility to update disclosures and the hearing file shall not terminate until the close of the hearing and the closing of the record.*⁷

C. Disclosure Disputes and Motions to Compel. The parties shall file any motions to compel or challenges regarding the adequacy of any mandatory disclosure or hearing file entry, the appropriateness of any redactions in documents, or the validity of any claim that a document

⁵ Letter from Tyson R. Smith, Counsel for Crow Butte Resources, to the Atomic Safety and Licensing Board (July 14, 2009).

⁶ See 10 C.F.R. §§ 2.336, 2.1203(a).

⁷ If the record is not closed at the close of the oral hearing, the Board will upon request or on its own motion set a new schedule for updates that is appropriate for whatever circumstance(s) may be cause for holding the record open.

is privileged or protected, as soon as is reasonably practicable, and in any event no later than: (1) during the period up to issuance of the final environmental review document or SER, whichever occurs later, ten (10) days after the occurrence or circumstance from which the motion arises, in accordance with 10 C.F.R. § 2.323(a); (2) during the period thereafter until two weeks prior to the deadline for filing initial statements, three (3) days after the relevant occurrence; and (3) during the remainder of the proceeding, one (1) day after the relevant occurrence. Any motion must clearly reference the occurrence or circumstance from which the motion arises and demonstrate that the applicable time limit has been met.

D. Additional Contentions

1. Motion for Leave to File; Statement of Contention(s); Support for Contention(s).

If a party seeks to file any new or amended contention(s) (timely or non-timely), then it shall file a motion or request for leave to file any such contention(s), along with the substance of the proposed contention(s), simultaneously. The pleading shall include a motion for leave to file any timely new or amended contention(s) under 10 C.F.R. § 2.309(f)(2), or a motion for leave to file any non-timely new or amended contention(s) under 10 C.F.R. § 2.309(c) (or both), as well as the statement of the contention(s) and the support therefor, demonstrating how the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi) are met.

2. Timeliness. A motion and proposed new or amended contention as specified in the preceding paragraph shall be deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty (30) days of the date when the new and material information on which it is based first becomes available.⁸ If filed thereafter, the motion and proposed contention shall be deemed non-timely under 10 C.F.R. § 2.309(c). If the movant is uncertain, it may file pursuant to both, and the motion should cover the three criteria of 10 C.F.R. § 2.309(f)(2) and the eight criteria of 10 C.F.R. § 2.309(c), as well as the six criteria of 10 C.F.R. § 2.309(f)(1).

⁸ This includes the final environmental review document and the final SER.

3. Answers and Replies. Within twenty (20) days after service of the motion and proposed contention, any other party may file an answer responding to all elements of the motion and contention.⁹ Within seven (7) days of service of the answer, the movant may file a reply.

4. Selection of Hearing Procedures. A motion and proposed new contention may address the selection of the appropriate hearing procedures for the proposed new contention(s).¹⁰

E. Motions for Summary Disposition. Any motions for summary disposition regarding Contention A, Supart A2, shall be filed no later than 30 days after issuance of the final environmental review document. Any motions for summary disposition regarding Contention A, Supart A1, shall be filed no later than 30 days after issuance of the final SER. Responses to any summary disposition motion shall be filed within 20 days after service of the motion. Any motions for summary disposition regarding any additional contention(s) that may be admitted in this proceeding shall be filed no later than 30 days after admission, unless an earlier deadline is set in the Order admitting the contention(s).

F. Initial Statements of Position, Prefiled Testimony, Affidavits, Exhibits. All parties shall file their initial written statements of position, prefiled written testimony with supporting affidavits, and exhibits, no later than 155 days after issuance of the final environmental review document or final SER, whichever occurs later.

⁹ Given the relative shortness of the 30-day period set herein for new contentions in comparison to the normal 60-day period for initial contentions, see 10 C.F.R. § 2.309(b), we deem it appropriate to shorten somewhat the period for answers to new contentions that is set at 10 C.F.R. § 2.309(h)(1). Because the 7-day period for replies set at 10 C.F.R. § 2.309(h)(2) is, however, already relatively brief, we leave that regulatory time period in place.

¹⁰ See 10 C.F.R. §§ 2.309(g), 2.310(d).

G. Motions in Limine; Rebuttal Statements of Position, Testimony, Affidavits, Exhibits.

No later than ten (10) days after service of the materials submitted under paragraph F, the parties shall file (1) any motion(s) in limine; and (2) rebuttal statements, rebuttal testimony with supporting affidavits, and rebuttal exhibits, on a contention-by-contention basis.¹¹ Responses to any motion(s) in limine shall be filed no later than five (5) days after filing of the motion(s).

H. Proposed Questions for Board to Ask. No later than ten (10) days after service of the materials submitted under paragraph G, all parties shall file proposed questions for the Board to consider propounding to the direct or rebuttal witnesses.¹²

I. Motions for Cross-Examination. No later than ten (10) days after service of the materials submitted under paragraph G, all parties shall also file any motions or requests to permit that party to conduct cross-examination of a specified witness or witnesses, together with the associated cross-examination plan(s).¹³

J. Evidentiary Hearing. The evidentiary hearing will commence approximately thirty (30) days after the service of the materials specified in paragraphs H and I.

K. Proposed Findings of Fact and Conclusions of Law; Responses. The parties shall simultaneously file proposed findings of fact and conclusions of law, containing specific references to transcript pages, exhibit numbers, and any relevant additional identification information, no later than thirty (30) days after the conclusion of the hearing or the closing of the record.¹⁴ Responses to other parties' proposed findings and conclusions shall be filed no later than 15 days after filing of the proposed findings and conclusions, with specific references to be made to pages and paragraphs of other filings, in addition to specific references to transcript pages, exhibit numbers, and any relevant additional identification information.

¹¹ See *id.* § 2.1207(a)(2).

¹² See *id.* § 2.1207(a)(3)(i) and (ii).

¹³ See *id.* § 2.1204(b).

¹⁴ See *id.* § 2.1209.

L. Initial Decision. The Board will issue its Initial Decision within 90 days after conclusion of the hearing or the closing of the record.

M. Modifications to Schedule. The Board understands that modifications of the schedule may be appropriate based on future developments, and will consult with the parties regarding any such modifications in the December 1 telephone conference and as otherwise necessary. Any motions for extension or modification of any timelines or deadlines set herein or required under relevant provisions of 10 C.F.R. Part 2 shall be filed as soon as reasonably possible after a party learns of the facts and circumstances establishing the need for modification of the schedule. Any motion to extend a deadline for filing any item shall be filed no later than three (3) business days before the due date for the submission at issue. Any motion shall indicate whether the request is opposed or supported by the other parties, and shall demonstrate appropriate cause for extending the deadline or otherwise modifying the schedule.

III. Additional Requirements and Considerations

A. Initial Statements of Position, Prefiled Testimony, Affidavits, Exhibits. An initial statement of position is not evidence, and should be in the nature of a trial brief that provides a precise road map of the party's case, setting out affirmative arguments and applicable legal standards, identifying witnesses and evidence, and specifying the purpose of witnesses and evidence (e.g., stating which issues each witness and exhibit addresses). The prefiled written testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, rely upon, or otherwise use in any statements.

B. Rebuttal Statements of Position, Testimony, Affidavits, Exhibits. The written response should be in the nature of a response brief that identifies the legal and factual weaknesses in an opponent's position, identifies rebuttal witnesses and evidence, and specifies the precise

purpose of rebuttal witnesses and evidence. The rebuttal testimony shall be under oath or by an affidavit so that it is suitable for being received into evidence directly, in exhibit form, in accordance with 10 C.F.R. § 2.1207(b)(2). The exhibits shall include all documents that the party or its witnesses refer to, rely upon, or otherwise use in their statements. Being in the nature of rebuttal, the rebuttal statements, testimony, and exhibits are not to advance any new affirmative claims or arguments that should have been, but were not, included in the party's previously filed initial written statement.

C. Proposed Questions for Board to Ask.¹⁵ The proposed questions should be accompanied by a brief description of the issue or issues which the party contends need further examination, the objective of the examination, and the proposed line of questioning (including specific questions) that may logically lead to achieving the objective. The proposed questions and accompanying material should be filed *in camera* and not served on the NRC Staff or any other party.¹⁶

D. Motions for Cross-Examination. A motion for cross-examination shall be filed with all parties, but the cross-examination plan and questions themselves should be filed *in camera* and not be served on the NRC Staff or any other party.¹⁷

E. Witnesses with Written Testimony To be Available in Person. Unless the Board expressly provides otherwise, each party (including the NRC Staff) must, at its own expense

¹⁵ A party should cover all essential points in the direct and rebuttal testimony that it prefiles for each of its own witnesses. The prefiled proposed questions should not focus on a party's own witnesses, but should instead be directed to the witnesses of the *other* parties.

¹⁶ See 10 C.F.R. § 2.1207(a)(3)(iii).

¹⁷ As the Commission pointed out in CLI-09-12, Subpart L does "contemplate requests for cross-examination by the parties," and, "[s]hould a discrete issue be identified at or before the oral hearing that warrants cross-examination by the parties, subpart L allows any party to request it." *Crow Butte*, CLI-09-12, 69 NRC at ___ (slip op. at 50). As also noted by the Commission, 10 C.F.R. §2.1204(b)(3) provides that the presiding officer (*i.e.*, the Board) "shall allow cross-examination . . . if . . . [it] is necessary to ensure the development of an adequate record for decision." See also *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 351 (1st Cir. 2004).

and effort, assure that each person for whom it submitted written direct or rebuttal testimony attends the evidentiary hearing in person and is available to testify and to respond orally to questions.¹⁸

F. Attachments to Filings

1. Documents Must Be Attached. If a motion or pleading of any kind refers to a report, website, NUREG, guidance document, or document of any kind (other than to a law, regulation, case, or other legal authority), (1) that document must be clearly and completely identified, and (2) a copy of that document, or the relevant portion thereof, shall be submitted with and attached to the pleading. The pleading must cite to the specific page or section of the document that is relevant.

2. Exception. If the following documents are publicly available on the NRC ADAMS system and are not submitted as exhibits for an evidentiary hearing, then they do not need to be attached to a motion or pleading: the Application and Environmental Report, the draft and final environmental review documents and SERs, and associated documents. With regard to such documents, it is sufficient if the pleading clearly identifies the document (including its date and revision number, if any), provides its ADAMS ML number, and cites to the specific page or section that is relevant.¹⁹

3. Attached Documents to be Labeled as "Attachments." All documents referred to in the pleadings (pursuant to the two preceding paragraphs), and which are not exhibits for an evidentiary hearing, shall be labeled and referred to as "Attachments," not exhibits.²⁰

¹⁸ If, after reading the prefiled testimony, the Board concludes that it has no questions for a particular witness and does not grant any cross-examination request regarding that witness, it will so advise the parties and that individual will not need to attend the evidentiary hearing.

¹⁹ The NRC's E-Filing guidance document has guidance concerning the filing of copyrighted material. See <http://www.nrc.gov/site-help/electronic-sub-ref-mat.html> (access link for Guidance for Electronic Submissions to the NRC, Revision 5).

²⁰ The term "exhibit" is reserved for use as a designation for those items that are submitted pursuant to paragraphs III.A and III.B as proffered *evidence* for the evidentiary hearing.

4. Designation and Marking of Attachments. A separate numeric designation shall be assigned to each Attachment (e.g., Attachment 3). With regard to Attachments covered by paragraph F.1, the numeric designation shall be prominently marked on the first page of the appended document.

5. Method of Electronic Submission. All Attachments associated with a pleading shall be submitted *together* via the E-Filing system as a *single* electronic file that consists of the pleading or other submission, the certificate of service, and all the Attachments, *unless* the submission exceeds fifteen megabytes in size. If a pleading exceeds fifteen megabytes, it should be separated into two or more submissions, clearly identified as relating to each other, with each less than fifteen megabytes.²¹

G. Questions About Schedule and Any Needed Modifications Thereto. In addition to motions for modification as set forth at II.M above, issues relating to the schedule for this proceeding may be brought up at any conference, whether in person or by telephone, depending upon time available, in the interest of seeing that this proceeding moves forward in the most efficient, effective and meaningful way possible.

²¹ This accords with NRC's E-Filing guidance (at page 14). See <http://www.nrc.gov/site-help/electronic-sub-ref-mat.html> (access link for Guidance for Electronic Submissions to the NRC, Revision 5).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of)
)
CROW BUTTE RESOURCES, INC.) Docket No. 40-8943-MLA
)
In-situ leach Uranium Recovery Facility,)
Crawford, Nebraska)
)
(License Amendment for the North Trend)
Expansion Area))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (SCHEDULE FOR PROCEEDING;
TELEPHONE STATUS CONFERENCE) have been served upon the following persons by
Electronic Information Exchange.

U. S. Nuclear Regulatory Commission
Office of Commission Appellate
Adjudications
Washington, DC 20555-0001
E-mail: ocaamail@nrc.gov

U. S. Nuclear Regulatory Commission
Office of the Secretary
Mail Stop O-16C1
Washington, DC 20555-0001

Hearing Docket
E-Mail: hearingdocket@nrc.gov

U. S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop – T-3 F23
Washington, DC 20555-0001

U. S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001

Ann Marshall Young, Chair
Administrative Judge
E-mail: ann.young@nrc.gov

Catherine Marco, Esq.
Brett Klukan, Esq.
Marcia J. Simon, Esq.
E-mail:

Richard F. Cole
Administrative Judge
E-mail: richard.cole@nrc.gov

clm@nrc.gov
Brett.Klukan@nrc.gov
mjs5@nrc.gov

Frederick W. Oliver
Administrative Judge
E-mail: fxo1@nrc.gov

OGC Mail Center: OGCMailCenter@nrc.gov

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Mark D. McGuire, Esq.
 McGuire and Norby
 605 South 14th Street, Suite 100
 Lincoln, NE 68508
 E-mail: mdmsjn@windstream.net

Thomas Kanatakeniate Cook
 1705 So. Maple St.
 Chadron, NE 69337
 E-mail: slmbttsag@bbc.net

Winston & Strawn, LLP
 101 California Street
 San Francisco, CA 94111
 Tyson R. Smith, Esq.
 Emily J. Duncan
 Counsel for Crow Butte Resources, Inc.
 E-mail: trsmith@winston.com
ejduncan@winston.com

The Oglala Delegation of the Great Sioux Nation
 Treaty Council
 Thomas J. Ballanco, Esq.
 Harmonic Engineering, Inc.
 945 Taraval Ave. # 186
 San Francisco, CA 94116
 E-mail: HarmonicEngineering1@mac.com

Western Nebraska Resources Council
 Chief Joseph American Horse
 Thomas K. Cook, Francis E. Anders
 David Cory Frankel, Esq.
 P.O. 3014
 Pine Ridge, South Dakota 57770
 E-mail: arm.legal@gmail.com

Owe Oku, Debra White Plume,
 and David House
 P.O. Box 2508
 Rapid City, South Dakota 57709
 Bruce Ellison, Esq.
 E-mail: belli4law@aol.com

Western Nebraska Resources Council,
 Chief Joseph American Horse, Thomas
 K. Cook, and Francis E. Anders
 Shane C. Robinson, Esq.
 2814 E. Olive St.
 Seattle, WA 98122
 E-mail: shanecrobinson@gmail.com

Alberto Saldamando
 International Indian Treaty Council
 2940 16th Street, Suite 205
 San Francisco, CA 94103-3688
 E-mail: alberto@treatycouncil.org

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Elizabeth Lornia, Esq.
Gonzalez Law Firm
522 7th Street, Suite 202
Rapid City, SD 57701
E-mail: elorina@gnzlawfirm.com

Debra L. White Plume, Director
Owe Aku, Bring Back the Way
P.O. Box 325
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

Grace Dugan, Esq.
Gonzalez Law Firm
P.O. Box 772
Ralston, WY 82440
E-mail: dugan@wavecom.net

[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 5th day of November 2009