

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

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Richard F. Cole
Brian K. Hajek

In the Matter of

CROW BUTTE RESOURCES, INC.

(License Renewal for the In Situ Leach Facility,
Crawford, Nebraska)

Docket No. 40-8943

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

October 31, 2011

MEMORANDUM

(Bringing Matter of Concern to Commission's Attention)

This Licensing Board has before it the application of Crow Butte Resources, Inc. (Crow Butte) for a renewal of the materials license for its *in situ* leach (ISL) uranium recovery operation located in Crawford, Nebraska.¹ Although the license was scheduled to expire more than three and a half years ago, the recovery operation continues today under its authority. This is so despite the fact that there is yet to be an evidentiary hearing on the claim of the intervenor Oglala Sioux Tribe (Tribe), reflected in contentions found admissible by the Board almost three years ago, alleging that the recovery operation is contaminating the water on the reservation upon which its members reside.² As a consequence of that contamination, the Tribe asserts,

¹ See Request for License Renewal of Source Materials License SUA-1534 – Crow Butte Resources, Inc. (Letter from Stephen P. Collings, President, Crow Butte Resources, Inc., to Charles L. Miller, Director, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, RE: Request for License Renewal Docket No. 40-8943, License No. SUA-1534) (Nov. 27, 2007) (ADAMS Accession No. ML073470645).

² See LBP-08-24, 68 NRC 691 (2008).

Tribal members are suffering substantial physical harm through ingestion of contaminated water that has migrated from the Crow Butte site to the reservation's water supply.³

The purpose of this memorandum is to bring to the Commission's attention a potential deprivation of the Tribe's hearing rights guaranteed to it by Section 189a of the Atomic Energy Act.⁴ As explained below, the Commission, but not this Board, has the power to address the matter and to direct, if so inclined, appropriate remedial measures.

I. BACKGROUND

The Crow Butte license was first issued in 1988 for a ten-year term and then renewed in 1998 for an additional ten years. A second renewal application that is now in issue was filed on November 27, 2007, some three months before the license's scheduled expiration on February 28, 2008. Having been submitted at least thirty days in advance of that expiration date, the application enables Crow Butte to continue to operate under the aegis of the license until the agency decides whether to grant the renewal.⁵

On March 28, 2008, the NRC Staff accepted the renewal application and, on May 27, 2008, a notice of opportunity for hearing to contest the license renewal was published in the

³ See Request for Hearing and/or Petition to Intervene, Oglala Sioux Tribe (July 28, 2008) at 7-8, 16-21 [hereinafter Tribe Petition].

⁴ See Atomic Energy Act § 189a(1)(A), 42 U.S.C. § 2239(a)(1)(A).

⁵ See 10 C.F.R. § 40.42(a); see also 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal . . . , a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."). This provision that a materials license continues in effect if the renewal application is filed no later than thirty days before the expiration of the license is in marked contrast with the time allotted for other types of NRC licenses. For example, a power reactor licensee may preserve its license by filing a renewal application at least five years before its license is set to expire, affording the Staff ample time to complete the required environmental and safety reviews. Cf. 10 C.F.R. § 2.109(b); Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943, 64,962-63 (Dec. 13, 1991) ("The Commission believes that the 30-day deadline for timely renewal . . . would not provide the NRC a reasonable time to review an application for a renewed operating license for a nuclear power plant.").

Federal Register.⁶ On July 28, 2008, several hearing requests were received in response to that notice, including that of the Tribe.⁷ On August 14, 2008, this Board was established and, on November 21, 2008, issued its decision that, among other things, determined the Tribe had standing and admitted its environmental contentions A, C, and D.⁸

For present purposes, it is not necessary to summarize the content of those contentions. It suffices to reiterate that they carried forward the Tribe's concern that the Crow Butte uranium recovery operation over the course of more than twenty years was causing the Tribe members physical harm.

On January 8, 2009—a month and a half after the grant of the Tribe's hearing request and the admission of its three environmental contentions—the Board entered an order in which it, among other things, (1) noted that the Staff then estimated a December 2009 date for the completion of its final environmental review document; and (2) directed the Staff to file brief monthly reports advising the Board whether the then estimated date for that completion had been changed or become more definite.⁹ In compliance with that directive, status reports have been submitted each month beginning with January 2009 and continuing, thirty-four months later, with the most recent report furnished to the Board on October 14, 2011.

Eleven of those status reports informed the Board of slippages in the estimated date of completion of the final environmental review document. As a result, the Staff now estimates

⁶ Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, 73 Fed. Reg. 30,426 (May 27, 2008).

⁷ See Tribe Petition; Consolidated Request for Hearing and Petition for Leave to Intervene (July 28, 2008; Request for Hearing and Petition for Leave to Intervene, Oglala Delegation of the Great Sioux Nation Treaty Council (July 28, 2008).

⁸ LBP-08-24, 68 NRC 691.

⁹ Initial Scheduling Order (Jan. 8, 2009) at 2, 4 (unpublished).

that the document will not surface until August 2012, two years and eight months after the Staff's initial date for completion.¹⁰

We have included an Appendix to this memorandum listing the date upon which each of those eleven reports was submitted, together with the explanation (if any) given by the Staff for the announced slippage. As will be seen, none of the very few provided explanations was to the effect that the slippage was occasioned by limited Staff resources. One of them (June 2009) did, however, attribute the slippage reported therein to "delays in receiving responses to Staff's requests for additional information."¹¹

In March 2011, following the Staff's ninth report of a slippage in the estimated date for completion of the final environmental review document, we issued a Memorandum requesting the Staff to submit an explanation for the continuing delays.¹² In response, the Staff reported that it "is currently taking steps necessary to identify the presence of historic properties within the area" in accordance with the National Historic Preservation Act,¹³ and that it had scheduled a meeting to consult with affected Indian Tribes in June 2011.¹⁴ The Staff did not give any reason why these actions had not been initiated long before June 2011.¹⁵ Finally, the Staff

¹⁰ See NRC Staff's Letter to the Atomic Safety and Licensing Board (Oct. 14, 2011) [hereinafter October 2011 Status Report].

¹¹ NRC Staff's Letter to the Atomic Safety and Licensing Board (June 16, 2009) at 1.

¹² Licensing Board Memorandum (Requesting Report from the NRC Staff) (Mar. 29, 2011) at 4 (unpublished).

¹³ 16 U.S.C. § 470 et seq.; in addition to the National Historic Preservation Act, such properties may also be protected by the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 et seq.; and by the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa et seq. See also LBP-08-24, 68 NRC at 713 & n.105.

¹⁴ NRC Staff's Submittal in Response to March 29, 2011 Memorandum Requesting Report from the NRC Staff (Apr. 15, 2011) at 4-5.

¹⁵ At oral argument on October 1, 2008 (two months before the Staff announced its expected completion date for the final environmental review document to be December 2009), the Staff informed the Board that it would undertake its review of cultural resources in consultation with the Tribe. Tr. at 363-64.

notified us in its response that its projected date for completing the environmental review document had been pushed back yet again, from August to December 2011.¹⁶

In the Staff's most recent report, the estimated date for completion has further slipped from this December to next August, a period of eight months. We are told that it is taking "significantly longer than previously anticipated" for the Staff to fulfill its statutory obligation to identify protected historic properties.¹⁷ Accordingly, the Staff recently requested Crow Butte to compile and to proffer "information regarding the identity and location of traditional cultural properties that could potentially be affected by" the grant of the license renewal application.¹⁸ We are further informed that the Staff expects Crow Butte to provide the requested information by May 2012.¹⁹

II. BOARD CONCERN

It is now almost three full years since, on November 21, 2008, this Board determined that the Tribe was entitled to a hearing on the merits of its claim alleging that the Crow Butte uranium recovery operation is contaminating the water that it counts upon for drinking and other purposes and "poses a serious health and safety risk to the residents of the [Pine Ridge Indian] Reservation."²⁰ Not only has this claim not received to date that hearing but also, as matters now stand, it will be at least another nine months before the Staff will complete its final environmental review document that always must precede the conduct of hearings on environmental issues.²¹

¹⁶ Id. at 5.

¹⁷ October 2011 Status Report at 1.

¹⁸ Id.

¹⁹ Id.

²⁰ Tribe Petition at 20.

²¹ See 10 C.F.R. § 2.332(d); Southern Nuclear Operating Co. (Early Site Permit for Vogtle ESP Site), CLI-07-17, 65 NRC 392, 394 (2007).

Yet, under the governing Commission regulation, having submitted its license renewal application more than 30 days prior to the scheduled expiration of its current license in February 2008, Crow Butte is allowed to continue operations under that license.²² At this stage of the proceedings, it matters not that the Tribe might be able to establish, once a hearing is eventually held, that its claim is meritorious and, therefore, its members might well have been sustaining additional grievous injury while the Staff conducted its environmental review the completion of which has, to date, been extended twelve separate times.

In our view, the extreme delay in the completion of the Staff's environmental review, and thus the equal delay in hearing the Tribe's claim of serious physical injury stemming from Crow Butte's operations, raises statutory compliance issues. It is reasonable to conclude that, in enacting Section 189a of the Atomic Energy Act, Congress assumed that individuals establishing a right to be heard in opposition to a license application would be heard with reasonable expedition. A delay exceeding three years, and possibly extending to four years or more, hardly so qualifies. Particularly is this the case where the federal government bears a trust responsibility to the Tribe, and the NRC, as a federal agency, owes a fiduciary duty to the Tribe and its members.²³

Despite the continued Crow Butte operation in the face of the Tribe's claim of resultant injury, we have watched the Staff submit one status report after another announcing still further delay in the completion of its environmental review. We have previously requested the Staff to explain these considerable delays, but our request has stanchd nothing—the delays continue. Had we possessed the authority to do so, we would have insisted upon a satisfactory explanation for every slippage of the completion date in light of the Tribe's enhanced entitlement to an expeditious hearing, given the continued Crow Butte operation and the fact that Crow

²² 10 C.F.R. § 40.42(a).

²³ United States v. Mitchell, 463 U.S. 206, 224 (1983); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

Butte had every incentive to endeavor to put off the hearing for as long as possible.²⁴ That consideration should have led, but apparently did not lead, the Staff to keep Crow Butte's feet to the fire in supplying requested information.

Particularly remarkable is the Staff's justification in its most recent report for the additional eight month slippage in the completion of the environmental review that makes it unlikely a hearing on environmental issues will take place before very late 2012 or 2013. For one thing, we see absolutely no reason why the identification of historic properties should not have been completed years ago.²⁵ Be that as it may, now giving Crow Butte more than six months to produce the additional requested information will exacerbate what is already a several year delay in affording the Tribe an opportunity to be heard on the merits of its claim that its members are being seriously and adversely affected by the Crow Butte uranium recovery operations.

The licensing boards were, however, long ago informed by the Commission that they are not empowered to superintend, to any extent, the conduct of Staff technical reviews.²⁶ Nevertheless, it seems apparent to this Board that the environmental review has been unduly protracted to the unwarranted detriment of the Tribe, and accordingly, the Commission might

²⁴ This is particularly so when the 10-year renewal period will be calculated from the date the renewal is issued. In effect, if Crow Butte's license is ultimately renewed (in 2012 or later), it will have been able to operate for at least four years (i.e., February 2008 [the date its license was scheduled to expire] to August 2012 [the current projected date of the environmental report]) after the original expiration date of its current license.

²⁵ Indeed, the Tribe pled a contention that involved historic properties and tribal artifacts (Tribal Environmental Contention B), alleging that for years preceding Crow Butte's renewal application, the NRC Staff had failed to fulfill its statutory obligation under the National Historic Preservation Act to consult with the Tribe regarding the cultural resources that Crow Butte itself has acknowledged encountering on its mining site. Although the Board admitted this contention, the Commission reversed, holding that the contention was premature. CLI-09-9, 69 NRC 331, 348-351 (2009). As a consequence, once the Staff completes its environmental analysis, if the Tribe remains unsatisfied with the results of the consultative process, a new contention could be filed, which, in turn, would occasion even further delay in affording a hearing to the Tribe on its contentions.

²⁶ See, e.g., Duke Energy Corporation (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 N.R.C. 62, 67 (2004).

deem it appropriate to ensure that the Staff will give priority to the conduct and completion of environmental reviews where, as here, the applicant for license renewal is allowed to continue operations under its license in the face of a serious challenge to renewal.

THE ATOMIC SAFETY
AND LICENSING BOARD²⁷

/RA/

Michael M. Gibson, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

/RA/

Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
October 31, 2011

²⁷ Copies of this Memorandum were sent this date by the agency's E-Filing system to the counsel/representatives for (1) applicant Crow Butte Resources, Inc.; (2) Consolidated Petitioners; (3) NRC staff; (4) Oglala Delegation of the Great Sioux Nation Treaty Council; and 5) Oglala Sioux Tribe.

APPENDIX

Summary of Monthly Status Reports

NRC Staff Status Report Date	Predicted Date of Issuance of the EA/EIS	Staff Explanation for Delay	Cumulative Delay
January 2009	December 2009	-	-
June 2009	February 2010	Delays in receiving responses to Staff's requests for additional information	2 months
October 2009	May 2010	None	5 months
February 2010	June 2010	The necessity of having to reschedule public meetings	6 months
May 2010	July 2010	None	7 months
June 2010	November 2010	None	11 months
November 2010	December 2010	None	12 months
December 2010	April 2011	None	16 months
January 2011	June 2011	None	18 months
March 2011	August 2011	None	20 months
April 2011	December 2011	Need to consult with the Tribes to identify historic properties under Section 106 of the National Historic Preservation Act	24 months
October 2011	August 2012	Identification of historic properties taking significantly longer than previously anticipated. "Staff recently requested that the Applicant compile and proffer information regarding the identity and location of traditional cultural properties that could potentially be affected by the proposed project . . . Staff expects to receive the requested information from the Applicant by May 2012."	32 months

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
CROW BUTTE RESOURCES, INC.) Docket No. 40-8943-OLA
)
In-Situ Leach Uranium Recovery Facility,)
Crawford, Nebraska)
)
(License Amendment))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM (Bringing Matter of Concern to Commission's Attention) (LBP-11-30)** have been served upon the following persons by Electronic Information Exchange.

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MEMORANDUM (Bringing Matter of Concern to Commission's Attention) (LBP-11-30)

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MEMORANDUM (Bringing Matter of Concern to Commission's Attention) (LBP-11-30)

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[Original signed by Nancy Greathead]
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this 31st day of October 2011