UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC. ,	)	Docket No. 40-8943
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the	)	
In Situ Leach Facility, Crawford, Nebraska)	)	April 1, 2015

CONSOLIDATED INTERVENORS' COMBINED REPLY TO NRC STAFF'S AND APPLICANT'S ANSWERS

Consolidated Intervenors[1] hereby submit the following combined reply to NRC Staff's and Applicant's Answers in accordance with the Board's Order dated March 19, 2015.

RIPENESS

On January 30, 2015, the Environmental Protection Agency ("EPA") filed a notice of proposed rulemaking in the Federal Register. 80 Fed. Reg. 4156 (January 2015). Consolidated Intervenors admit that some confusion may have resulted from the

[1] Western Nebraska Resources Council ("WNRC"), Owe Aku/Bring Back the Way, Debra White Plume, Beatrice Long Visitor Holy Dance, Joe American Horse & Tiospaye, Thomas Cook, Loretta Afraid-of-Bear Cook & Tiwahe. Debra White Plume, Beatrice Long Visitor Holy Dance, Joe American Horse and Loretta Afraid-of Bear Cook are members of the Oglala Sioux Tribe (the "Tribe") at Pine Ridge Indian Reservation.

choice of abbreviation, "Proposed Rules" to refer to the notice in the Federal Register and will hereafter refer to the document as the Notice of Proposed Rulemaking ("NPRM").

Both NRC Staff and the Applicant argue that Consolidated Intervenors' proposed new contentions are untimely and unripe because the new contentions are based on the EPA's Notice of Proposed Rulemaking. Since the proposed regulations that are the subject of the NPRM may change before they are finally issued, they argue, there is no actual controversy for Consolidated Intervenors to base their claims.

Prior to presenting the three pages of actual regulatory amendments and additions to 40 C.F.R. § 192, the EPA, as required by the Administrative Procedures Act, published a 26-page preamble. 5 U.S.C. § 553(b)(3)(1994) (requiring that a notice include "either the terms or substance of the proposed rule, or a description of the subjects and issues involved"). It is this preamble that forms the substance of the Consolidated Intervenors' proposed new contentions.

The Consolidated Intervenors are aware that the amendments to 40 C.F.R. § 192 Subpart C and Subpart D as well as the proposed language for a new Subpart F are not final agency action. After the close of the comment period, the text of the amendments and additional Subpart F will almost certainly change. However the findings and rationales listed in the preamble are final agency action, not subject to notice and comment, and represent the opinions and understandings of the EPA, after careful analysis, that gave rise to the need for rulemaking. As the U.S. Appellate Court for the D.C. Circuit explained in *Solite Corp. v. EPA*, "Integral to the notice requirement is the agency's duty 'to identify and make available technical studies and data that it has

employed in reaching the decisions to propose particular rules.'" *Solite Corp. v. EPA*, 952 F.2d 473, 484-485 (D.C. Cir. 1991)(quoting, *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982), cert. denied, 459 U.S. 835 (1982).

The Consolidated Intervenors' proposed new contentions rely exclusively on the EPA's studies, data, analyses and rationale included in the preamble of the NPRM and only make reference to the actual text of the proposed Subpart F to demonstrate the kinds of requirements the EPA is considering as a means to address the problems it identified.

In its Answer at p. 8 FN 37, NRC Staff cites to the *Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin* case to support its position that contentions relying on the NPRM are unripe because the court wrote that, "issuance of a notice of proposed rulemaking…**often** will not be ripe for review." (emphasis added). This reliance misses the significance of the remainder of the quoted sentence in *Auto Safety v. Traffic Safety,* which continues, "an agency decision to terminate its rulemaking procedures usually is ripe for review as final agency action." *Ctr. For Auto Safety v. Nat'l Highway Traffic Safety Admin* 710 F.2d 842, 846 (D.C. Cir. 1983). That case dealt with the decision by the NHTSA to withdraw its proposed rulemaking regarding fuel efficiency standards in new automobiles because "market factors" were already driving the auto industry to adhere to more exacting standards than those proposed. Unfortunately, market forces in this case are driving the ISL industry in exactly the opposite direction of the EPA's NPRM. The *Auto Safety v. Traffic Safety* court concluded that,

> These statements accompanying the withdrawal of the January Notice clearly interpret the relevant statute and indicate NHTSA's policy regarding the exercise of discretion granted to it by that legislative enactment. Given our prior decisions construing the Administrative

> Procedure Act's broad definition of "rule," we are compelled to conclude that NHTSA has prescribed a rule sufficient to grant this court jurisdiction.

Id. EPA's NPRM certainly interprets relevant statutes and indicates the EPA's policy regarding the protection of groundwater resources from the identified impacts of ISL mining.

Even the Supreme Court has relied on the language accompanying agency publication of a proposal for notice and comment, when attempting to determine the meaning and intent of agency action. *See, Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 212-13 (1981) ("We are aware that after we granted certiorari in this case, the [Federal Reserve]Board deferred final action…but we cannot agree that the staff's views expressed in the proposed ruling are wholly without significance").

After years of study and analysis, the EPA has determined that the regulatory protocols regarding in situ leach (ISL) mining are insufficient to address disturbing trends in the industry, particularly regarding the impacts of ISL mining to groundwater resources and the industry's inability to restore post-mining aquifers. The Consolidated Intervenors share these concerns and believe the EPA's new analyses highlight inadequacies in NRC Staff's analysis of CBR's License Renewal Application.

The EPA's findings, rationale and expressed need for regulatory amendment contained in the preamble to the NPRM are determinative of the agency's intent in promulgating the new regulations. In fact, by publishing its NPRM, the EPA is bound to address the inadequacies and shortcomings its analyses uncovered. If the final regulations are not a "logical outgrowth" of the proposed rules, then they can be

invalidated for violating notice and comment procedures. *Solite Corp. v. EPA*, at 499. *See also*, *Shell Oil, Co. v. EPA*, 950 F.2d 741, 750-752 (D.C. Cir. 1991).

While the words in the proposed regulations may change, it is certain, even with only the publication of the NPRM, that the EPA has identified real concerns with in situ leach mining and with the manner in which it is regulated. What appears equally certain is that NRC Staff has not.

CONTENTION ADMISSABILITY

The legal standards for admissibility of the newly filed EA Contentions are found in 10 CFR Sect. 2.309. This Board stated the applicable standards in its ruling in LBP-08-24:

> The requirements for an admissible contention include a specific statement of the issue of law or fact to be raised or controverted, a brief explanation of the basis of the contention, and a concise statement of the alleged facts that support the contention, together with references to those specific sources, expert opinions and documents on which the petitioner intends to rely to prove the contention. Additionally, the petitioner must present sufficient information to show a genuine dispute with the applicant on a material issue of law or fact. Proffered contentions generally must fall within the scope of the issues set forth in the notice of the proposed licensing action. Failure of a contention to meet any of the requirements of section 2.309(f)(1) renders it inadmissible. (Footnotes omitted.)

In addition, Sections 2.309(c) and 2.309(f)(2) apply, which sections when read together contemplate the situation presented by this case where we have

newly filed contentions based on newly proposed EPA regulations directly issued to address problems at ISL mines concerning groundwater protection failures.

Section 2.309(c) states, in pertinent part, that:

> [M]otions for leave to file new or amended contentions filed after the deadline in paragraph (b) of this section will not be entertained absent a determination by the presiding officer that a participant has demonstrated good cause by showing that:
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> (i) The information upon which the filing is based was not previously available;
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> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

Accordingly, 'good cause' is demonstrated where, as here, there has been compliance with Section 2.309(c)(i), (c)(ii) and (c)(iii). The 'information upon which the filing is based' for purposes of Section 2.309(c)(i) and (ii) is the EPA NPRM published in the Federal Register, which first became available on January 30, 2015. Therefore, in this proceeding, there has been compliance with Section 2.309(c)(i).

The NPRM published by EPA contains analyses, data and conclusions that are 'materially different' as well as 'differ significantly' (which Consolidated

Intervenors maintain are a single standard).[2] The NPRM inherently is information that is materially different than the LRA, SER or Final EA because of such additional analyses and conclusions, much of which has been quoted and or cited in Consolidated Intervenors newly filed contentions.

As noted in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI- 02-28, 56 NRC 373, 385 (2002):

> NRC Staff's analyses in the SEISs, while taking into account Duke's responses, are not identical to Duke's analyses. The SEISs often go a step further, providing additional information, analysis, and reaching some conclusions different from Duke's.

Here, the analysis is presented by EPA - not NRC but the conclusion must be the same. The new analyses in the NPRM, while taking into account ISL operations and restorations, generally, are not identical to Crow Butte's or NRC Staff's analyses. In its NPRM, the EPA provides additional information, analysis and reaches some conclusions that are different than those of either Crow Butte or the NRC Staff as to the same pertinent issues. These are issues that must be addressed by Applicant and NRC Staff in order for there to be compliance with Part 40, Appendix A, as stated in Consolidated Intervenors March 16, 2015 contention filing.

Based on the foregoing, there has been compliance with Section 2.309(c)(ii).

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[2] Compare, 2.309(c)(ii)('materially different') and Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI- 02-28, 56 NRC 373, 385 (2002) ("Intervenors' amended contention must rest on data or conclusions that ''differ significantly'' from what was submitted in the Environmental Report.")

There is no dispute that Consolidated Intervenors filed the newly filed contentions on time in accordance with the Board's Scheduling Orders in this proceeding. As a result, Consolidated Intervenors have complied with Section 2.309(c)(iii).

As required by 10 C.F.R. § 2.309(f)(1), the Consolidated Intervenors have set forth specific new contentions based on the EPA's NPRM. Each contention raises issues with respect to the sufficiency of the LRA, the SER, and/or the Final EA under applicable law, namely: the National Environmental Policy Act ("NEPA"), the Atomic Energy Act of 1954, as amended, 10 C.F.R. §§ 51.10, 51.70, and 51.71, Part 40, Appendix A, and any other applicable federal, state, and local requirements. Each contention states a specific section of the LRA, SER and/or Final EA that constitutes the dispute raised in the contention. Accordingly, Consolidated Intervenors have surpassed mere 'notice pleading' and have complied with the 'strict by design' pleading requirements for contention admissibility in Section 2.309.

Consolidated Intervenors acknowledge that both Crow Butte and the NRC Staff would prefer to not litigate these new EPA based Contentions and they have attempted to mis-characterize the new EPA Contentions as 'late-filed contentions' - it never seems to be a 'good' time to bring new contentions as far as Applicant and the NRC Staff are concerned.

This Board has the power and authority under 10 CFR 2.319, and specifically including subsection (s) thereof, to take necessary and appropriate actions

consistent with the Atomic Energy Act of 1954, as amended, and the Administrative Procedure Act, as well as applicable NRC Regulations to conduct a fair hearing:

> A presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order. The presiding officer has all the powers necessary to those ends, including the powers to: ….(s) Take any other action consistent with the Act, this chapter, and 5 U.S.C. 551–558. 10 CFR 2.319(s).

Therefore, this Board has the power and authority, and in fact the duty, to take all lawful actions necessary to the ends of conducting a fair and impartial hearing. Consolidated Intervenors encourage the Board to exercise such power and authority in a way that provides Consolidated Intervenors and the Tribe with an opportunity to be heard on the issues presented in this case as described in the previously filed and newly filed contentions.

SPECIFIC REPLIES

Reply to CBR & NRC Staff re: *South Texas* LBP-11-7

Crow Butte and the NRC Staff make much of the import of a board ruling *South Texas* LBP-11-7, to support their positions that the newly filed contentions must fail.[3] Although the *South Texas* LBP-11-7 ruling is not binding on this Board, Consolidated

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[3] See CBR Answer p.8, fn38 ("[i]n the context of NRC proceedings, as one licensing board has stated, a proposed rule "may not support an admissible contention" because "its ultimate effect is at best speculative."[38] ; and seeNRC Staff Answer p.13, fn61; p.15, fn70; p.17, fn76; p.19, fn87; p.21, fn96, fn99; p.24, fn114; p.25, fn119, fn122; p.26, fn129.

Intervenors recognize that this Board may follow similar thinking. A close reading of the *South Texas* LBP-11-7 ruling reveals that the portion cited by Crow Butte and (so many times) by NRC Staff, at p.290[4], fn233 of the ruling, states that the intervenors in that case were correct to file contentions based on proposed rules that later became issued rules.

The EPA has already found and stated in the NPRM that the prior interpretations/activities of NRC Staff (under Part 40, App. A, implementing Part 192 groundwater protections) to be wrong and has issued new interpretations that are immediately applicable via the NPRM. The EPA has also proposed amendments to Subpart D and E and a new Subpart F which are still subject to comment, but which will be issued in some form and when that happens, Consolidated Intervenors will be in the same position as the intervenors in the South Texas case. In LBP-11-7, the board in *South Texas* ruled that the contentions based on proposed rules were timely and, therefore, this Board should likewise rule that the newly filed contentions based on the NPRM are timely.

In *South Texas* LBP-11-7 at fn233, that board made some statements in the nature of dicta concerning whether a proposed rule would be admissible. In the dicta, the board stated that a proposed rule having no legal effect would not support an admissible contention. In this case, the NPRM contains immediately effective legal interpretations of existing Part 192 regulations, over which EPA has primacy. Such Part 192 regulations are made applicable to Crow Butte and the LRA and this proceeding by Part 40, Appendix A which requires compliance with the Part 192 regulations, as interpreted by

[4] Slip. op. p.42.

EPA in the NPRM. Accordingly, this case is clearly distinguishable from the situation described in the dicta in Fn233.

In that Fn233, the board also cited to a commission precedent in *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC __, __ (slip op. at 17-18) (Sept. 30, 2010), which is binding on this Board. In *Northern States Power Co*. CLI-10-27, the Commission ruled that a proffered contention concerning 'Safety Culture' was inadmissible where the contention was based on several notices of violations issued several months before the contention was filed. *Id.*, slip. op. at 17.

In the *North States Power Co.* CLI-10-27 case, the Commission simply reiterated the applicability of *Duke Power Co.(*Catawba Nuclear Station, Units 1 and 2) and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), neither of which preclude the admission of the newly filed contentions because the contentions are based on new information, analyses and data issued by EPA in the NPRM and not previously available. *North States Power Co.* CLI-10-27, slip. op. at 17, fn69. As stated in the March 16th contention filing and elsewhere in this Reply, the newly filed contentions based on the NPRM comply with the foregoing Commission rulings because of the new EPA analyses to the effect that the application of Part 192 by NRC Staff for the benefit of the industry under Part 40, Appendix A is wrong and not effective to adequately protect groundwater. Accordingly, the newly filed contentions should not be barred under the reasoning of fn233 in *South Texas* LBP-11-7, or under the *North States Power Co*. CLI-10-27 ruling (or other rulings cited therein).

Replies to CBR

At CBR Answer, p.5, Crow Butte states that there can be no contention based on requirements that do not exist. Such statement fails to recognize that under Part 40, Appendix A, the requirements of Part 192 are already applicable. As EPA states in the NPRM, the way the requirements were being applied by NRC Staff was wrong (to the extreme benefit of Crow Butte and the rest of the ISL/ISR industry and to the extreme detriment of groundwater protection). Therefore, the newly filed contentions are based on EPA's newly available interpretations of currently existing requirements applicable to Crow Butte. As a result, all of Crow Butte's assertions must fail if based on its supposition that the newly filed contentions are not based on existing legal requirements.

At CBR Answer, p. 5, Crow Butte asserts that the newly filed contentions are the subject of ongoing rule making and, as a result, should not be made the subject of this proceeding. But such assertion is misplaced as the newly filed contentions are based on the NPRM but are not the subject of any ongoing rulemaking.

Reply to CBR re: newly filed Contention F11 - CBR fails to see that under Part 40, Appendix A, and the Part 192 regulations, over which EPA has primacy, the groundwater protections described by EPA in the NPRM and the proper ways of interpreting baselines and restoration goals, are legally applicable to Crow Butte. Therefore, the contentions are not premature and should be admitted.

Replies to NRC Staff

In their Answer at p.7, NRC Staff argues that the 11e.(2) rules related to tailings, over which NRC has primacy, and as to which the NRC may issue waivers under AEA Section 84(c), should be the focus of the legal analysis. However, the NRC Staff does not dispute that under Part 40, Appendix A, the regulations for groundwater protection in Part 192, over which EPA has primacy, do also apply in addition to the 11e.(2) rules. Since EPA has primacy on the nature and extent of groundwater protection under Part 192, the EPA does in fact have the last word on groundwater protection. Accordingly, the EPA NPRM does support newly filed contentions.

At FN 36 of its Answer, the NRC Staff asserts that it sees no basis why the Section 84(c) language would not be extended to Subpart F as it has in the past been extended to Subpart D and E - the language that says that NRC can take up to 3 years and also give waivers as to the secondary standards. Consolidated Intervenors assert that the EPA says that prior NRC use of those waivers was a big problem, so there is reason to believe that EPA will retain primacy and not allow those waivers to continue for new Subpart F.

NRC Staff argues that there is no genuine dispute because the EPA rules are not 'relevant' because they are only proposed rules. Consolidated Intervenors assert that the EPA commentary must be read as an 'official record' of EPA under 10 CFR 2.337(e) and EPA's statements in the NPRM of the failures of NRC to impose proper Part 192 standards must be accepted as factual and in dispute with NRC's views. *See*, *Batterton v.*

Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980)("The Administrative Procedures Act broadly defines 'rule' to include nearly every statement an agency may make.")(internal citations omitted). Since Consolidated Intervenors have based the newly filed contentions on EPA's statements in the NPRM, there is a dispute between EPA/Consolidated Intervenors, on the one hand, and NRC/CBR, on the other.

In the NRC Answer, p9-10, the NRC admits that if EPA's rule interpretations stated in the NPRM are in effect then CBR is required to account for additional costs in its financial surety in the LRA. When the EPA rules go into effect, the surety will need to be increased from the current $45mm to some greater number. In light of the prospects of Cameco's bankruptcy, it is likely that the surety bond will be called on to pay decommissioning costs not paid by Cameco.

At NRC Answer, p. 12, concerning newly filed Contention F2, the NRC Staff suggests that any challenge to the adequacy of its descriptions in the EA amounts to impermissible 'fly-specking.' Consolidated Intervenors strongly dispute such a restrictive view because it would completely undermine the NEPA process. Consolidated Intervenors assert that the heart of NEPA is the ability of the public to challenge the adequacy of the NRC Staff's descriptions in the EA. Accordingly, any objections to the newly filed contentions based on the NRC Staff's overly restrictive views of what might constitute impermissible 'fly-specking' must fail.

At NRC Answer, p. 13, there is evidenced a dispute as to the factual question of whether Crow Butte is in actual 'production' or 'standby/restoration' as its Principal Activity given that it has increased its restoration flows and its production has declined to

a level that is 40% below its licensed production flow rates. According to NRC Staff, the disagreement by NRC Staff as to that factual question means that Consolidated Intervenors have made a 'bald assertion'. It is not possible to comply with due process and at the same time rule that anyone who disagrees with the NRC Staff has made an inadmissible 'bald assertion.' The more logical and due process based approach is to recognize that there is a factual question that must be resolved as to whether the 'Principal Activity' of the Crow Butte mine has shifted from production (scheduled to end in Fall 2014) to restoration. Keeping in mind the EPA's interpretation stated in the NPRM that ISL mines are not capable of being in 'standby' mode and that a mine has shifted to restoration despite incidental production, it is clear that Contention F2 is admissible and that the factual question of whether Crow Butte has shifted to restoration/decommissioning in accordance with its projected schedule in the LRA, should be made part of the hearing.

In its Answer at pp 16-17, the NRC Staff maintains that the Consolidated Intervenors have failed to demonstrate that inadequate baseline data impacts the FONSI. Consolidated Intervenors reiterate, and are pleased to see the EPA's NPRM in accord, that baseline values that are not adjusted for the oxidation that results from the initial boring of monitoring wells into the ore body can "lead to a misleading picture of background conditions." NPRM at 4174. Without an accurate "picture of background conditions" than NRC Staff has no sound basis on which to ground its analysis. Finding no significant impact under such conditions is arbitrary and capricious. Not only do inadequate baselines make meaningful analysis impossible, the Consolidated Intervenors

assert, and the EPA agrees, that these skewed values, "can, in turn, result in selection of artificially high baseline goals."

At NRC Answer, p.22, Contention F9 is addressed. The NRC Staff makes several arguments to rebut Contention F9 including that it is an impermissible attack on NRC Regulations in violation of 10 CFR 2.335(a) and that Consolidated Intervenors have failed to point out an EPA statement "indicating that the NRC has set baselines or standards in ways favorable to industry." NRC Answer at 22. First, since Consolidated Intervenors have not challenged any NRC regulation, the NRC position that there is an impermissible attack barred by 2.335(a) is misplaced and must fail. Second, the NPRM states clearly that NRC Staff have been allowing 'class of use' restoration standards in violation of EPA interpretations, and have allowed the use of high values to set baselines; all of which are to the benefit of the ISL industry.

Examples cited by Consolidated Intervenors to support the newly filed Contention F9 include:

Contention F9, Mar. 16th Filing at p.51: EPA states that prior to the NPRM, current ISL industry practices, and related NRC oversight, has been short-sighted; a longer view of groundwater protection is necessary. EPA also states that current practices for restoration and monitoring of the affected aquifer may not be adequate to prevent further degradation of the water or the widespread contamination of groundwater that is suitable for human consumption.[5]

[5] Mar. 16 Filing at 51 quoting NPRM: "In particular, we believe it is necessary to take a longer view of groundwater protection than has been typical of current ISR industry practices. Although

Contention F9, Mar. 16th Filing at p.51: EPA states in the NPRM that under industry standards and NRC Staff supervision, the nature and extent of the future contamination problems are not well understood and that, as a result, the costs of remediation of such contamination problems are borne by the public and not by the ISL licensees like Crow Butte. EPA further states that such costs of remediation are very large and exceed the costs being imposed by EPA for longer term monitoring.[6]

Contention F9, Mar. 16th Filing at p.52-53: EPA states in the NPRM that NRC Staff have implemented groundwater protection standards in a non-rigorous manner.[7]

Contention F9, Mar. 16th Filing at p.54: EPA states in the NPRM that despite all these years, and all the experience of the NRC Staff, there has been uncertainty and confusion in how to apply the groundwater restoration standards. The NPRM further states EPA's concern that NRC Staff releases ISL sites from regulatory control before it is

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the presence of significant uranium deposits typically diminishes groundwater quality, current industry practices for restoration and monitoring of the affected aquifer may not be adequate to prevent either the further degradation of water quality or the more widespread contamination of groundwater that is suitable for human consumption."

[6] Mar. 16 Filing at 51 quoting NPRM: "Because monitoring after restoration is typically conducted for only a short period, we find it difficult to characterize the probability or magnitude of future contamination problems, or the costs involved in remediating such future contamination. Such costs are not now borne by ISR licensees, nor is there any guarantee that they could be held responsible if contamination were detected by new monitoring implemented years, decades or even longer after the end of site activities once the facility is officially decommissioned and the license is terminated by the NRC or Agreement State. It is likely, however, that the costs of such future remediation would far exceed the costs of the more extensive monitoring (in all phases of site activity) that we are proposing today…."

[7] Mar. 16 Filing at 52-53 quoting NPRM: "Based upon the information that we have reviewed, (23) we believe an even more rigorous approach is warranted for (a) determining background groundwater concentrations, which are necessary to establish appropriate restoration goals, (b) establishing restoration goals, and (c) demonstrating the continued stability of groundwater after restoration. In addition, prolonged stability monitoring is needed to provide the necessary level of confidence that groundwater quality will not degrade over time or promote contaminant migration in the future."

demonstrated that the groundwater will not degrade over time.[8] Consolidated Intervenors have asserted that this confusion is due to the 'cozy' relations between the NRC Staff and the industry, including its largest player Crow Butte.

Contention F9, Mar. 16th Filing at p.55-57: EPA states in the NPRM current NRC Staff and industry (including Crow Butte) practices have not been sufficiently rigorous to provide confidence that the groundwater is being restored properly or stably.[9] The NPRM states that the granting of ACLs has not always been done by NRC Staff as intended, including NRC Staff use of 'class of use' restoration goals and the granting of ACLs by regulators before any restoration efforts have been attempted. The EPA states in the NRPM that this situation can result in inadequate protection of groundwater. EPA further states that it is not appropriate to select high-end values as representative values for restoration at ISL sites.[10]

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[8] Mar. 16 Filing at 54 quoting NPRM: "We believe there has been some uncertainty about how to apply the current standards,…there has been confusion about applicability of UMTRCA restoration requirements at aquifers that have been exempted from the standards of the SDWA….We believe these provisions are necessary to ensure that ISR sites are not released from regulatory control until it can be reasonably demonstrated that groundwater will not degrade over time."

[9] Mar. 16 Filing at 55 quoting NPRM: "Nevertheless, we believe there is sufficient information available to indicate that practices related to groundwater protection at ISR facilities have not been sufficiently rigorous to provide confidence either that groundwater is being restored appropriately or that such restoration will persist into the reasonably foreseeable future."

[10] Mar. 16 Filing at 56-57 quoting NPRM: "While the 19 criteria to be considered in granting ACLs are spelled out for Title II sites in 40 CFR 192.32(a)(2)(iv) through incorporation of 40 CFR 264.94(b), they have not always been implemented as intended. In the past, NRC and Agreement States have issued secondary class-of-use restoration goals at ISR sites, but these goals were typically less restrictive than meeting background concentration levels. NRC no longer recognizes class-of-use as an appropriate standard for restoration of groundwater at uranium ISR facilities; secondary class-of-use restoration goals are inconsistent with the requirements of 40 CFR part 192 and 10 CFR part 40, Appendix A. There is evidence that relaxed restoration standards have been granted in Agreement States, and some instances where ACLs have been identified and approved by the regulator before restoration efforts have been initiated and/or completed….We believe these situations can result in insufficient protection of groundwater;…There is evidence that regulators and operators have at times used high-end values to represent the overall wellfield or have used a generalized "class-of-use" for the groundwater to

Based on the foregoing, it is clear that the existence of a 'cozy' relationship favoring industry to the detriment of the protection of groundwater near ISL mines, such as and including Crow Butte's mine in this case, is part of the reason why EPA issued the NPRM and proposed new Subpart F. Further, it is clear that NRC Staff has failed to take a 'hard look' at the nature and extent of restoration standards due to that 'cozy' relationship with industry. Accordingly, this contention should be admitted.

At NRC Answer p. 23-24, the NRC Staff argues that it is not required to take a 'hard look' at impacts resulting from the NPRM. In defending against newly filed Contention F10, the NRC Staff admits that its role is to take a 'hard look' at the proposed action. *Id.* at 24. The proposed action in this case is the license renewal for the Crow Butte mine. The Crow Butte mine is subject to Part 40, Appendix A which includes the requirements for groundwater protections stated in Part 192. The NRC Staff is clearly required to take a 'hard look' at whether the Crow Butte mine is in compliance with the Part 192 groundwater protection requirements, as interpreted by EPA. The EPA's interpretation prior to the NPRM was that the NRC Staff's implementation of Part 192 regulations to protect groundwater was adequate. The EPA's new interpretation as a result of the issuance of the NPRM is that the NRC Staff's implementation of Part 192 regulations to protect groundwater is no longer considered adequate. The LRA was written in contemplation of the pre-NPRM state of play and the SER and Final EA were likewise based on the pre-NPRM state of play. Now, post-NPRM, the prior and

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set restoration goals. We do not believe this is appropriate, as we explain below….We stated previously that we do not believe it is appropriate to select among high-end measurements as representative values for restoration."

inadequate implementation of Part 192 regulations have been abandoned in favor of the interpretations stated in the NPRM and, as a result, the NRC Staff is required to take a 'hard look' at impacts from the mine under the interpretations of the NPRM. Accordingly, there is a genuine dispute as to a material issue that is within the scope of this proceeding and this contention should be admitted.

The NRC Answer at p.25-26 challenges the admissibility of newly filed Contention F11 based on an asserted failure to identify portions of the LRA that are the bases of the contention. In Contention F11, Consolidated Intervenors identify portions of the SER (the most current safety related document) that are themselves based on the LRA. These portions contain information that is called into question by the NPRM because they relate to the applicable interpretation of the Part 192 standards that have now changed. Clearly there is a genuine dispute as to whether the safety discussions need to be modified in light of the NPRM with the Consolidated Intervenors asserting that all the safety discussions in the LRA that relate to the quoted portions of the SER, and the SER itself, are inaccurate due to the NPRM and with NRC Staff and Crow Butte asserting the opposite. Based on that dispute, the legal weight given to EPA interpretations of how Part 192 regulations should be implemented stated in the NPRM, and the specific citations to the safety discussions, this contention F11 should be admitted.

CONCLUSION

For all the foregoing reasons, the Board should find that the new contentions are admissible.

Dated this 1st day of April, 2015.

Respectfully submitted,

_____/s/_____

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Rapid City, SD 57709
Tel: 605-348-9458
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In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC. ,	)	Docket No. 40-8943
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the	)	
In Situ Leach Facility, Crawford, Nebraska)	)	April 1, 2015

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing '**CONSOLIDATED INTERVENORS' COMBINED REPLY TO NRC STAFF'S AND APPLICANT'S ANSWERS**, together with the Exhibits attached thereto and filed therewith, in the captioned proceeding were served via email on the 1st day of April 2015, which to the best of my knowledge resulted in transmittal of same to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

/s/

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Thomas J. Ballanco
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(650) 296-9782
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Subject:	Consolidated Intervenors Combined Reply
Date:	Wednesday, April 01, 2015 11:39:31 PM
Attachments:	Cons Int Reply 412015.pdf

Counsels,

Attached please find the Consolidated Intervenors' Combined Reply to NRC Staff's and Applicant's Answers. Please let me know if there are any problems with downloading or opening the document.

Thank you,

Thomas J. Ballanco
Attorney for Consolidated Intervenors