

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-MLA-2  
) ASLBP No. 13-926-1-MLA-BD01  
(Marsland Expansion Project) )  
) September 17, 2018

**OGLALA SIOUX TRIBE’S ANSWER TO NRC STAFF’S  
MOTION IN LIMINE**

The Oglala Sioux Tribe (“OST”) hereby submits the following Answer to NRC Staff’s Motion in Limine filed September 12, 2018.

**INTRODUCTION**

As a microcosm to the underlying proceedings, the NRC Staff filed its Motion in Limine on September 12, 2018, seeking to exclude a number of OST Exhibits, as well as numerous portions of direct and rebuttal testimony filed by OST expert witnesses. For the reasons discussed below, the OST requests that the NRC Staff’s Motion in Limine be denied and that the OST Exhibits be admitted as filed.

**LEGAL STANDARDS**

While licensing boards have the power to, “restrict irrelevant, immaterial, unreliable, duplicative or cumulative evidence and/or arguments” under 10 C.F.R. § 2.319 (e), they are not bound by formal rules of evidence. [10 C.R.R. § 2.319(d)]. Particularly in Subpart L proceedings, such as here, where concerns of unfair prejudice

and confusion that are typically addressed by the Federal Rules of Evidence are rarely an issue. [*See, PSEG Power, LLC & PSEG Nuclear, LLC* (Early Site Permit Application) LBP 16-4, 83 NRC 187, 210-11 fn 171 (2016).] Thus “a licensing board normally has considerable discretion in making evidentiary rulings.” [*Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2) CLI 04-21, 60 NRC 21, 27 (2004).]

OST respectfully suggests that its experts are eminent. They have extremely relevant knowledge and experience and their input to the proceeding is invaluable to ensure the issues in the admitted contention and its subparts are fully heard and fairly adjudicated in accordance with NRC Regulations, the Administrative Procedure Act and the National Environmental Policy Act.

#### **DIRECT TESTIMONY OF MICKEL WIREMAN IN OST004**

NRC Staff’s asks to exclude numerous portions of OST004, based, at least in part, on its overly narrow characterization of the admitted OST Contention 2. One relates to meteorological data, while three challenged portions of Mr. Wireman’s testimony raise questions about the impacts of mining on the potentiometric surface of the Basal Chadron aquifer and the potential for decline and/or drawdown.

The NRC Staff’s narrow reading of Contention 2 as OST assertion that the Environmental Assessment (EA) and CBR licensing documents “fail to contain sufficient hydrogeological information to demonstrate the ability to contain fluid migration.” [NRC Staff Motion in Limine at 5] ignores the first part of the four part specification of the Contention as delineated by the Board in LBP 18-2 namely that the Contention encompasses:

(1) the adequacy of the descriptions of the affected environment for establishing the potential effects of the proposed MEA operation on the adjacent surface water and groundwater resources;

Even if the Board finds that Mr. Wireman's challenged testimony is outside the scope of this aspect of Contention 2, both CBR and NRC Staff testimony rely on the potentiometric surface of the Basal Chadron to demonstrate confinement of the aquifer. [See CBR001 & NRC001]. Whether that surface will be drawn down during operation of the MEA facility is clearly relevant to examination of adequate confinement.

Likewise NRC Staff's abridged construction of Contention 2 neglects the relevance of Mr. Wireman's challenged testimony regarding baseline data and restoration goals. Again Contention 2, as articulated by the Board encompasses:

(3) the failure to develop, in accord with NUREG-1569 section 2.7, an acceptable conceptual model of site hydrology that is adequately supported by site characterization data so as to demonstrate with scientific confidence that the area hydrogeology, including horizontal and vertical hydraulic conductivity, will result in the confinement of extraction fluids and expected operational and restoration performance;

Mr. Wireman's testimony, as proffered, speaks directly to this aspect of Contention 2.

**DIRECT TESTIMONY OF DR. KREAMER OST003 & SUPPORTING EXHIBITS OST005, OST006, OST007 & OST008**

NRC Staff also seeks to exclude numerous portions of Dr. Kreamer's direct testimony, that address claims made in the Pump Test Report [CBR016] regarding assumptions about the characteristics of the aquifer and its confinement. Despite apparently conceding that Dr. Kreamer's testimony is directed at the

passage from CBR016 that he identifies in his challenged Opinion 2, NRC Staff still requests that this testimony be excluded as not relevant. [NRC Staff Motion In Limine at 11.] As the Licensing Board pointed out in its Ruling on Remaining Evidentiary Objections in the Crow Butte Renewal case, “testimony about the basic hydrogeology of the general area and Crow Butte’s installation of testing and monitoring wells is essential for determining whether there is communication between certain aquifers.” [12/06/16 Order at 5 —ML16341B962.]

Not only is Dr. Creamer’s proffered testimony and related exhibits relevant to the determination of aquifer containment, but it specifically addresses Contention 2 as encompassed by:

(4) whether the final EA contains unsubstantiated assumptions as to the isolation of the aquifers in the ore-bearing zones.

**REBUTTAL TESTIMONY OF DR. KREAMER (OST014) & MR.  
WIREMAN (OST015)**

NRC Staff seeks to exclude numerous portions of the Rebuttal Testimony of Dr. Creamer and Mr. Wireman on the grounds that they introduce new arguments that could have been raised earlier and because they do not rebut “new” information in CBR and NRC Staff testimony and exhibits. [NRC Staff Motion In Limine at 13.]

While, as discussed above, Licensing Boards are not bound by the Federal Rules of Evidence, they do refer to them at times for guidance. [*See, S. Cal. Edison Co.* (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB 7-17, 17 NRC 346,

365 fn 32 (1983).] The Eight Circuit Court of Appeals has ruled that rebuttal evidence is properly admissible when it will “explain, repel, counteract or disprove the evidence of the adverse party.” [U.S. v. Lamoreaux, 423 F.3d 750, 755 (8<sup>th</sup> Cir. 2005).]

Each of the numerous opinions offered in Rebuttal Testimony by Dr. Kreamer and Mr. Wireman refer to the specific portions of CBR and/or NRC Staff testimony that they address. [OST014 & OST015 passim.] NRC Staff seems to be advocating the position that if a witness, in their direct testimony, makes reference to information in licensing and/or environmental documents already in evidence, then that testimony cannot be rebutted. The OST rejects this absurdity and requests that the Rebuttal Testimony of Dr. Kreamer and Mr. Wireman be admitted as proffered.

#### **DIRECT TESTIMONY OF DR. HANNAN LAGARRY IN OST016**

NRC Staff’s asks to exclude entirety of OST016, based on NRC’s assertion that all of it could have been bought as initial testimony. Dr. LaGarry was not available to provide any initial testimony. Rather, the only testimony he is able to provide is by OST016 and in person. The Board is aware of Dr. LaGarry’s unique experience and qualifications as the foremost living stratiagrapher of the region in which the mine is located. To exclude his testimony in OST016 would do a disservice to the proceeding, and would have such a material adverse impact as to be a substantive violation of the

trust responsibility owed to the OST. Therefore, the NRC's argument to exclude OST016 should be denied.

### CONCLUSION

For all the foregoing reasons, the Board should deny NRC Staff's Motion in Limine and admit the OST Exhibits as filed.

Dated this 17th day of September, 2018.

Respectfully submitted,

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\_\_\_\_\_/s/\_\_\_\_\_

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\_\_\_\_\_/s/\_\_\_\_\_

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing '**OGLALA SIOUX TRIBE'S ANSWER TO NRC STAFF'S MOTION IN LIMINE**', in the captioned proceeding were served via the EIE on the 17th day of September, 2018.

Respectfully submitted,

*signed electronically*

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