

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
) ASLBP No. 07-859-03-MLA-BD01
(North Trend Expansion Project))
) January 10, 2024

**CONSOLIDATED INTERVENORS' ANSWER TO CROW BUTTE
MOTION TO WITHDRAW LICENSE AMENDMENT APPLICATION**

The Consolidated Intervenors hereby timely submit the following Answer to Crow Butte's Motion to Withdraw License Amendment Application filed December 29, 2023.

INTRODUCTION

The North Trend Expansion Area ("NTEA") license amendment application has been pending since May 30, 2007 – which is more than 16-1/2 years. Since it was filed in 2007, there have been a great many changes in the law and NRC policy having to do with environmental justice, climate change and consultation obligations with indigenous people and in the status of the operation itself which is now in a restoration phase. Further, the NTEA site is fraught with known faults and is very close to the City of Crawford and the people (and animals, flora and fauna) there deserve to be relieved of the threat of future mining there. Therefore, the license amendment application as filed over 16 years ago is outdated, and should be dismissed with prejudice. In the alternative, if the Board dismisses without prejudice, it should bar the re-submission of an identical application and impose reasonable conditions on resubmission to include compliance with updated NRC rules, regulations and policies concerning Tribal

Consultation, compliance with Trust Responsibility, Climate Change, Environmental Justice and require Applicant to use updated scientific and site specific information concerning the proposed site.

LEGAL STANDARDS

CBR as Applicant and as proponent of the order has the burden of proof under 10 C.F.R. § 2.325. [10 C.F.R. § 2.325].¹ All motions must be addressed to the Commission or other designated presiding officer. All motions, other than motions for summary disposition, must be made no later than ten (10) days after the occurrence or circumstance from which the motion arises. [10 C.F.R. § 2.323(a)(2)].² A licensing board is vested with the power to dismiss an application with prejudice or to impose conditions on withdrawal. *Phila. Elec. Co.*, (Fulton Generating Station, Units 1 and 2) ALAB-657, 14 NRC 967, at 974 (1981). “The record must reveal that the proceeding demonstrates some legal injury to a private or public interest that the conditions are designed to eliminate.” *Sequoyah Fuels Corp.* (Source Material License No. SUB-1010), LBP-93-25, 38 NRC 304, 315 (1993), *aff’d*, CLI-95-2, 41 NRC. 179 (1995) citing *Phila. Elec. Co.*, ALAB-657, 14 NRC 967, at 974. When the Board imposes terms and conditions of withdrawal, they “must bear a rational relationship to the conduct and legal harm at which they are aimed” and “the record must support any finding concerning the conduct and harm in question.” *Phila. Elec.*

¹ Consolidated Interveners acknowledge that to the extent they are viewed as the proponent of the “with prejudice” ruling, they would bear the burden of proof; however, CBR’s Motion to Withdraw was filed expressly to be “without prejudice” and Consolidated Interveners respectfully suggest that as a result, CBR as proponent of the “without prejudice” ruling and as proponent of the Motion to Withdraw should bear the burden of proof.

² CBR’s Motion to Withdraw (at p.2) states that it had chosen to withdraw the LAR and submitted a letter to that effect on December 18, 2023, and such Motion to Withdraw was filed eleven (11) days after the occurrence or circumstance from which the motion arises, i.e., one day late, on December 29, 2023. However, in light of the Memorandum and Order of the Board dated January 2, 2024, Consolidated Interveners waive any objections to CBR’s Motion to Withdraw based on its lateness.

Co., ALAB-657, 14 NRC at 974 (citing *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604-605 (5th Cir. 1976)). The prospect of a second proceeding, *standing alone*, “does not provide the requisite quantum of legal harm to warrant dismissal with prejudice.” *Id.* at 979 (citing *Jones v. SEC*, 298 U.S. 1, 19 (1936)) (emphasis added). “The possibility of future litigation with its expenses and uncertainties is precisely the consequence of any dismissal without prejudice.” *Puerto Rico Electric Power Auth.* (North Coast Nuclear Plant Unit 1), ALAB-662, 14 NRC 1125, at 1135 (1981) (citing *Jones*, 298 U.S. at 19)³. Where an applicant intends to re-submit an application, a withdrawal with prejudice would be a severe sanction and, in such case, “a withdrawal with prejudice should be reserved for those unusual situations which involve substantial prejudice to the opposing party or to the public interest in general.” *Id.* at 1132. The NRC has the authority to condition the withdrawal of a license application on such terms as it thinks just. 10 CFR 2.107(a); *Puerto Rico Electric Power Auth.*, 14 NRC 1125, at 1132-1133.

“As an independent regulatory agency that does not hold in trust Tribal lands or assets, or provide services to Federally recognized Tribes, the NRC fulfills its Trust Responsibility through implementation of the principles of the Tribal Policy Statement, by providing protections under its implementing regulations, and through recognition of **additional obligations consistent with other applicable treaties and statutory authorities.**” *Tribal Policy Statement (82 FR 2402) at p.2 (emphasis added)*. In this case, the relevant treaties are the 1851 Ft. Laramie Treaty and the 1868 Ft. Laramie Treaty which remain in effect (except that Article 2 of the 1868 Treaty was modified, and Article 16 of the 1868 Treaty was abrogated by Article I of the Act of Feb. 28, 1877,

³ Please note that CBR used incorrect citations in its Motion to Withdraw at footnotes 13 & 14; the correct citation is to *Puerto Rico Electric Power Auth.* (North Coast Nuclear Plant Unit 1), ALAB-662, 14 NRC 1125, at 1132 & 1135 (1981).

19 Stat. 254, 255 (1877); and the International Covenant on Civil and Political Rights (ICCPR). As a result of the 1868 Treaty, the Lakota (including the Oglala Sioux Tribe members) were granted protections of hunting rights in any lands north of the North Platte, which includes the area known in this proceeding as the NTEA. Applicable statutory authorities include the American Indian Religious Freedom Act (AIRFA), the Religious Freedom Restoration Act (RFRA), the Native American Graves Protection and Repatriation Act (NAGPRA) in addition to the National Historic Preservation Act (NHPA) and the National Environmental Protection Act (NEPA). Therefore, under current NRC Tribal Policy, the NRC is required to ensure that CBR as applicant complies with and refrains from actions inconsistent with the 1851 Ft. Laramie Treaty, the 1868 Ft. Laramie Treaty, the ICCPR, the AIRFA, the RFRA, the NAGPRA, the NHPA and NEPA. The Ft. Laramie Treaties that guarantee hunting and fishing rights have been interpreted by courts to include gathering and trapping rights as well. See *US v. Aanerud*, 893 F2d 956 (8th Cir.), cert. den. 498 US 822 (1990).

Existing caselaw interpreting the federal trust responsibility requires that “if an ambiguity in a statute or treaty ‘can reasonably be construed as the Tribe would have construed, it must be construed that way.’” *Ramah Navajo Chapter v. Lujan*, 112 F3d 1455, 1462 (10th Cir. 1997), quoting *Muscogee (Creek) Nation v. Hodel*, 851 F2d 1439, 1445 (D.C. Cir. 1988), cert. den., 488 US 1010 (1989). The Supreme Court has recognized that the United States has “moral obligations of the highest responsibility and trust” to Indians and must use “great care” in its dealings with them. See *Seminole Nation v. US*, 316 US 286 (1942); *US v. Mason*, 412 US 391, 398 (1973).

The Board is thus required to provide deference to the views of Native American petitions, affidavits and testimony in this proceeding, especially when there has been no rebuttal thereof. Further, the NRC is required to ensure that CBR as applicant refrain from actions that would

interfere with hunting, fishing, gathering and trapping activities by Tribal members. In addition, the NRC is required to ensure that CBR as applicant comply with all applicable NRC guidance documents including *A Guidance Document for Characterizing Tribal Landscapes*, BOEM 2015-047 (November 30, 2015).

Further evolution of NRC understandings include recent studies on the potential impacts of accelerated climate change. See *Potential Impacts of Accelerated Climate Change* (May 2016) (Adams ML16208A282). These include predictions of increased drought risk and higher likelihood of hazardous convective weather. The NRC's understanding of its obligations in the area of environmental justice has also evolved since this proceeding was commenced. See *Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions* (2004) (69 FR 52040). The NRC recognizes that the impacts, for NEPA purposes, of its regulatory or licensing actions on certain populations may be different from impacts on the general population due to distinct cultural characteristics or practices. *Id.* at 1. This includes impacts on minority and low income populations such as those who live in the City of Crawford, in Dawes County and at Pine Ridge Indian Reservation. *Id.*

In addition, the NRC's understanding of proper tribal consultation methods has evolved since this proceeding started. See, e.g., *Tribal Protocol Manual Guidance for NRC Staff* (2018) (NUREG-2173, Revision 1) (Adams ML 18214A663). Consolidated Intervenors respectfully suggest that much of the Tribal Protocol Manual Guidance was developed as a direct result of the proceedings in which Consolidated Intervenors have been involved, including this proceeding.

CITATION TO RECORD IN THIS PROCEEDING

In this proceeding, Consolidated Intervenors have proffered Affidavits of Rita Long Visitor Holy Dance (Adams ML080660092), Beatrice Long Visitor Holy Dance (Adams ML080660093), Harvey Whitewoman (Adams ML080660094); and January 16, 2008 Hearing Exhibit B Exhibit B, “NDEQ Detailed Technical Review Comments” November 8, 2007 (Adams ML073300399) (“NDEQ Review”). Consolidated Intervenors have also proffered testimony of Chief Joe American Horse and Chief Oliver Red Cloud, each of the Oglala Sioux Tribe and Lakota Nation. Also referenced herein are the Petitions of Intervenors Debra White Plume/Owe Aku (Bring Back The Way) (Adams ML 073240333) and Western Nebraska Resources Council, (Buffalo) Bruce McIntosh (Adams ML 073240313), each dated November 12, 2007.

Petition of Intervenor Debra White Plume/Owe Aku (Bring Back the Way) (Adams ML 073240333): The impacts of the North Trend mining to the health and environment of people and wildlife relying on the High Plains aquifer and the Arikaree aquifer should be evaluated as part of the Application. (Para. 8). International human rights standards indicate the Indigenous peoples’ whose lands are affected by development projects have the right to “free, prior and informed consent.” (Para. 9). The entire 80km radius should be used to evaluate the impacts of the North Trend mining to the health and environment of people and wildlife who are admittedly downwind and/or downstream of CBR’s current and proposed operations. (Para. 10). CBR’s Application mentions a prehistoric Indian camp found in the area proposed for the North Trend expansion. CBR is not qualified to make judgments about the significance of the Indian camp as an archaeological find or significance to the Oglala Sioux people. Oglala Sioux elders should be consulted concerning such prehistoric Indian camp. Further, the planned ground disturbances will disturb ancient archeological sites. (Para. 15).

Petition of Intervenor Western Nebraska Resources Council, (Buffalo) Bruce McIntosh (Adams ML 073240313): An approval of the amendment would adversely affect Petitioner's property values due to contamination of the air, surface water and groundwater by CBR's operations (Exhibit A, page A-2, para. 3(b)).

Affidavit of Rita Long Visitor Holy Dance (Adams ML080660092): "To the Lakota people, the nature of water has cultural and spiritual significance and value that is much greater than its use and value as a vital natural resource." (Para. 5). "This means that we honor *nni* as water for drinking, bathing, domestic, farming and other benign uses and it has value to us for such purposes." (Para. 6). "Pristine water is the basis for the natural medicines that we as indigenous grandmothers learned from our mothers and grandmothers and that we need to pass on to our daughters and granddaughters. These medicines may not be made with adulterated water." (Para 9).

Affidavit of Beatrice Long Visitor Holy Dance (Adams ML080660093): "We are taught that we pray with water before we drink it. We are taught to respect the water." (Para. 5). "Lakota people use water to make our medicines. We put herbs in the water, pray with it and use it for healings." (Para. 6). "Lakota people need to have good water nearby to use for our ceremonies." (Para. 10). "Lakota people are taught to honor our water, to respect it, to understand that it is holy and sacred to us." (Para. 14).

Affidavit of Harvey Whitewoman (Adams ML080660094): "There is a life and spirit in the water which we, as indigenous people, recognize and commune with and pray with and we know its healing power." (Para. 11). "There may be Indian graves or other Indian artifacts at the site that are of historic and/or cultural significance." (Para. 13).

Testimony of Chief Joe American Horse (HT at 179-180; Adams ML 080220489): “In my life I like to have a clean environment....Lakota used to be a large nation with 10,000 campfires....Gold was discovered in California. They want to go through Indian Country. So they signed this treaty, the 1851 Treaty, to let the settlers and the gold miners go through....Under the leadership of Oliver Red – Chief Red Cloud, Oliver’s grandfather, negotiating [the]...1868 Treaty, Fort Laramie Treaty. In that these treaties are supposed to act, they are supposed to follow what they say to us, how to conduct ourselves and like that. They’ve never been followed....And our concern is really important because the water which we’re drinking, the water downwind, we’re talking about a sweat lodge we have every two weeks.”

Testimony of Chief Oliver Red Cloud (HT at 182-184; Adams ML 080220489): “I am Chief Red Cloud, Oglala Sioux Tribe. And my great, great grandpa made that treaty....the water rights, you’re talking....that belongs to the Lakota people....I listen...about what’s going to happen over here on the Crawford, Nebraska....That’s the first agency we used to have. And under that are water rights and mineral rights....”

January 16, 2008 Hearing Exhibit B, consists of a copy of a November 8, 2007, letter from Dr. Steven A. Fischbein, Program Manager with the Nebraska Department of Environmental Quality (NDEQ), to CBR President Stephen P. Collings, regarding CBR’s “Petition for Aquifer Exemption North Trend Expansion Area,” and an 18-page, single-spaced attachment containing “NDEQ Detailed Technical Review Comments.” (Adams ML08109024). This NDEQ Review was ruled admissible and relevant and part of the record by LBP 08-06 (April 29, 2008), at page 15. This Board in LBP 08-06 stated that “[w]ith regard to possible domestic use of the Basal Chadron Aquifer, the Review notes “that, contrary to CBR’s claim that there is no such use, “in close proximity outside the exemption boundary at least one well is used for domestic purposes,

and a number of wells are used for agricultural purposes.” *NDEQ Review at 16; LBP 08-06 at 21-22*. Continuing, it is stated that “[t]his then seems to establish that the groundwater in the vicinity of the NTEA has some beneficial use, and is (or can be) used for domestic purposes.” *Id.*

“CBR has presented no evidence that this unit contains ANY concentrations of uranium that may be considered to be of commercial value.” *NDEQ Review at 5* (emphasis in original). “Siltstones and claystones of the Lower Brule may be fractured due to structural modification on the Crawford/White River Structure, and thus may be more permeable than other locales. This coupled with the widely dispersed or intermittent channel sandstones of the lower Brule may create permeability pathways that are heretofore uncharacterized. Again, site specific core data will be required to proceed.” *NDEQ Review at 6*. “There is no reference to more recent data, such as Figure 4 from LaGarry (1998) or Figure 3 from Terry and LaGarry (1998) which shows details of faulting in the Toadstool Park area. *NDEQ Review at 8*.

ARGUMENT

THE BOARD SHOULD DISMISS THE APPLICATION WITH PREJUDICE

CBR has the burden of proof and has failed to provide any citation to the record in its Motion to Withdraw. Therefore, CBR has presented nothing factual to support its position. CBR has no plans to re-file an application for the NTEA⁴ and, thus, there is no prejudice to CBR to dismiss the NTEA license amendment application with prejudice. Because CBR has stated expressly that it has no intention to re-file an application for the NTEA, this case is distinguished

⁴ CBR Motion to Withdraw at p. 3-4.

from *Philadelphia Electric Co.* and *Puerto Rico Electric Power Auth.* where a “with prejudice” ruling was said to be particularly harsh and punitive requiring a showing of harm of comparable magnitude. See, e.g. *Puerto Rico Electric Power Auth.*, 14 NRC 1125, at 1132. Here, the magnitude of harshness to CBR is nil because it does not intend to re-file and so any showing of a scintilla of public harm should be sufficient to allow the Board to make a “with prejudice” ruling.

The harm to the public interest in not dismissing the license amendment application with prejudice is:

- 1) A second proceeding, not standing alone but in the context of the view that the water is sacred and any action that might adulterate the water should be avoided, taken together with the poverty of people in the City of Crawford and Dawes County, and extreme poverty of the people of Pine Ridge Indian Reservation (in the context of environmental justice concerns), would be cost prohibitive for the affected public to oppose. Therefore, such public should be relieved of the stress and anxiety of having to coalesce again for opposition to mining in the NTEA. *Affidavit of Rita Long Visitor Holy Dance (Adams ML080660092)* at paras 5, 6 & 9; *Affidavit of Beatrice Long Visitor Holy Dance (Adams ML080660093)* at paras 5, 6, 10 & 14; *Affidavit of Harvey Whitewoman (Adams ML080660094)* at paras 11 & 13; and *Testimony of Chief Joe American Horse (HT at 179-180; Adams ML 080220489)*.
- 2) The public in City of Crawford and near the perimeter of the NTEA would be relieve of the negative affect on their property values created by the specter of mining the NTEA. *Petition of Intervenor Western Nebraska Resources Council, (Buffalo) Bruce McIntosh (Adams ML 073240313)* at Exhibit A, page A-2, para 3(b).

Dismissal of the license amendment application with prejudice would allow the residents of the City of Crawford and the members of the Oglala Sioux Tribe to relax from the threat of mining in the NTEA. They would be relieved of the stress that arises from knowing about the risk to the water supply from the aquifer mixing from proposed mining operations and potential contamination of ground and surface waters. Similarly, the termination of any possible expansion of mining into the NTEA would likely be supportive of property values in the City of Crawford.

Since the 1981 Philadelphia Electric Co. decision, indeed since the commencement of this proceeding, the law and policy of the NRC concerning environmental justice and the rights and interest of indigenous people have evolved considerably. When this proceeding started, the parties actually briefed the Board on the law regarding indigenous rights, treaties and federal Indian law (see Petitioners' Memorandum at Adams ML080640548; NRC Brief at Adams ML080560580; and CBR Brief at Adams 080630090). Thus, on January 9, 2017, the NRC published its Tribal Policy Statement (82 FR 2402) which recognizes the NRC has a Trust Responsibility to protect Tribal treaty rights, lands, assets and resources as well as a duty to carry out the mandates of Federal law with respect to Indian Tribes. NRC Tribal Policy Statement – Definitions (82 FR 2403, 2404-2405 (January 9, 2017)). The NRC Tribal Policy Statement recognizes explicitly that “Under the Federal Trust Doctrine, the United States—and the individual agencies of the Federal government—owe a fiduciary duty to Indian Tribes.” *Tribal Policy Statement at p.1*. Thus, the Board is obligated to consider the viewpoints of indigenous people who have filed testimony in this proceeding with respect to their interests, rights and treaty benefits. In light of the NRC Tribal Policy Statement, such additional obligations, and such viewpoints, the Board should view the interests of indigenous people as legitimate and take them into careful consideration when making a decision as to whether to order dismissal (or in this case, withdrawal) *with prejudice*.

Consolidated Intervenor's position is that it is not just the prospect of a second proceeding, standing alone, but rather in this case, it is the prospect of respecting the rights of and performing additional obligations owed to the indigenous people concerning their view of the sacredness of the water as a form of living spirit of God. See *NRC Tribal Protocol Manual* (Adams ML12261A423) at p. 10) "Many Native Americans place great importance and spiritual value on the relationship between them and the environment. Staff should be aware that many Native Americans feel a strong commitment to respecting the earth and that many tribes are cautious when considering actions that may harm the earth. Some Native Americans believe that all living things are interconnected and that the spiritual worlds and natural worlds are one. Because of this, perceived threats to their environment may be viewed as direct threats to their health, culture and spiritual well-being." *Id.*

Since CBR has no intention of re-filing the license amendment application, a ruling "with prejudice" would not be particularly harsh or severe in this proceeding; whereas, a ruling "without prejudice" would provide no relief to the people of the City of Crawford, Dawes County or Pine Ridge Indian Reservation. In the balance of equity, the Board should find in favor of the people and against CBR in this case and rule "with prejudice".

IF THE BOARD DISMISSES THE APPLICATION WITHOUT PREJUDICE IT SHOULD IMPOSE REASONABLE CONDITIONS ON RE-APPLICATION

If the Board grants the withdrawal of the license amendment application without prejudice, the Board should impose conditions for resubmitting an application with respect to the NTEA that includes barring submission of an application identical to the license amendment application, requiring submission of a new application that demonstrates compliance with then current federal law and NRC policies concerning climate change, environmental justice, respect for the rights of

and consultation with indigenous people including the Oglala Sioux Tribe and updated site specific data and information concerning water use, water availability and shortages in and around the City of Crawford and Dawes County. Further reasonable conditions based on the record include:

- 1) Require any new application to demonstrate that mining in the NTEA will not impact any water wells in or adjacent to the NTEA. *NDEQ Review at 16.*
- 2) Require any new application to demonstrate that the NTEA contains concentrations of uranium that may be considered to be of commercial value at the time of re-application and that such value exceeds the value of water that would become unusable as a result of the approval of such application for mining in the NTEA. *NDEQ Review at 5.*
- 3) Require any new application to contain sufficient detail and information to enable the NRC to be able to demonstrate compliance with then applicable NRC rules, regulations, guidance and policy including those concerning climate change, environmental justice, tribal consultations, and Trust Responsibility. *Potential Impacts of Accelerated Climate Change; Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions; NRC Tribal Policy Statement; Tribal Protocol Manual Guidance; Guidance Document for Characterizing Tribal Landscapes.*
- 4) Require any new application to demonstrate that it contains updated site specific data and updated scientific information and published research as of the date of re-application. *NDEQ Review at 8.*
- 5) Require any new application to contain sufficient detail and information to enable NRC to comply with its obligations under NEPA, NHPA, AIRFA, RFRA, NAGPRA, Ft.

Laramie Treaties, and the ICCPR. *Petition of Intervenor Debra White Plume/Owe Aku (Bring Back the Way) (Adams ML 073240333); Testimony of Chief Joe American Horse (HT at 179-180; Adams ML 080220489); Testimony of Chief Oliver Red Cloud (HT at 182-184; Adams ML 080220489).*

CONCLUSION

For all the foregoing reasons, the Board should dismiss CBR's license amendment application for the NTEA with prejudice in accordance with 10 CFR §2.107(a).

In the alternative, if the Board grants the withdrawal of the license amendment application without prejudice, the Board should impose reasonable conditions for resubmitting an application with respect to the NTEA that includes barring any re-submission of an identical application and the requirements for a new application listed above to include demonstrating compliance with then current federal law and NRC policies concerning climate change, environmental justice, respect for the rights of and consultation with indigenous people including the Oglala Sioux Tribe and updated site specific data and scientific information concerning water use, water availability and value and shortages in and around the City of Crawford and Dawes County.

Dated this 10th day of January, 2024.

Respectfully submitted,

/s/ _____

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NUCLEAR REGULATORY COMMISSION
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CROW BUTTE RESOURCES INC.)	ASLBP No. 07-859-03-MLA-BD01
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(North Trend Expansion Project))	January 10, 2024

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer to Motion to Withdraw License Amendment Application has been served through the E-Filing system on the participants in the above-captioned proceeding, this 10th day of January, 2024.

Respectfully submitted,

/s/

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