RAS B-41

May 23, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment Application for North Trend Expansion Project)	)	

APPLICANT'S BRIEF REGARDING FOREIGN OWNERSHIP ISSUES

In accordance with the May 2, 2008 Order of the Atomic Safety and Licensing Board in this matter, Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby submits supplemental briefing on Contention E. As is discussed further below, the statutory and regulatory provisions highlighted by the Licensing Board ("Board") in LBP-08-06 are not applicable to facilities such as Crow Butte's current operations or the North Trend Expansion. Further, Contention E is inadmissible because it raises issues outside the scope of this limited license amendment proceeding and in any event fails to demonstrate a genuine issue of law or fact. Finally, although the Board found that certain petitioners had standing with respect to Contentions A, B, and C, no petitioners have demonstrated standing with respect to proposed Contention E.

BACKGROUND

A. Contention E

As proposed by petitioners, Contention E states:

> CBR Fails to Mention It is Foreign Owned by Cameco, Inc., So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There Is No Assurance The CBR Mined Uranium Will Stay In US for Power Generation.

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Pet., at 24. In support of this contention, petitioners identify two bases:

- "CBR is owned by Cameco since 2000. Cameco also runs operations in Canada and Kazahstan and which sell Uranium products to other non-US buyers which may include China, India, Pakistan, North Korea and possibly Iran unless there are Canadian regulations which restrict such sales"; and

- "It is material that CBR is owned by a Canadian company that will make profit or lose on its investments. Petitioner submits that we, as US persons, care less about the profits of a Canadian company than for the health and safety of our environment. The Application makes no reference to the chain of possession of this nuclear source material or who the buyers are and where it may end up or how it may be used."

Petitioners do not cite any statutory or regulatory provisions in support of the proposed contention, nor do they claim that foreign ownership is prohibited by law.

B. Crow Butte Ownership

The land (fee and leases) at the Crow Butte facility is owned by Crow Butte Land Company, which is a Nebraska corporation. All of the officers and directors of Crow Butte Land Company are U.S. Citizens. Crow Butte Land Company is owned by Crow Butte Resources, Inc., which is the licensed operator of the facility. Crow Butte Resources, which does business as Cameco Resources, is also a Nebraska corporation. All of its officers are U.S. citizens, as are 2/3 of its directors. Crow Butte Resources is owned by Cameco US Holdings, Inc., which is a U.S. corporation registered in Nevada. Again, all of the officers of Cameco US Holdings are U.S. citizens, as are 2/3 of the directors. Cameco US Holdings is held by Cameco Corp., which is a Canadian corporation. Cameco Corp. is publicly traded on both the Toronto and New York Stock Exchanges. According to the most recent information available on institutional and retail ownership, total U.S. shareholdings in Cameco are 52%. Canadian ownership accounts for 39% of outstanding shares.

C. Uranium

Cameco is the leading U.S. producer of uranium. *See Energy Information Administration*, U.S. Department of Energy, http://www.eia.doe.gov (2008). Crow Butte and Smith Ranch-Highland, which both provide uranium to Cameco, have accounted for the vast majority of all U.S.-produced uranium for nearly a decade. *Id.* Cameco is also the largest supplier of uranium to U.S. utilities. More than half of Cameco's global sales in 2007 were to U.S. customers, which include, among many others, the Omaha Public Power District in Nebraska and the U.S. Government (Tennessee Valley Authority). Ultimately, Cameco supplied approximately 32% of all U.S. uranium requirements in 2007. This uranium accounts for more than 5% of all electricity generated in the United States.

DISCUSSION

A. Issuance of a License Amendment Does Not Violate AEA Section 103d. or 10 C.F.R. § 40.38

In LBP-08-06, the Board identified two specific questions for further briefing. Specifically, (1) whether the issuance of a license amendment to the Applicant would be in direct violation of 10 C.F.R. § 40.38; and (2) if not restricted under § 40.38, whether foreign ownership of the Applicant would, under Part 40, including § 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment.

First, the Board highlighted Section 103d. of the AEA, which governs "Commercial Licenses" and states that "no license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." 42 U.S.C. § 2133d. The

Board also highlights 10 C.F.R. § 40.38, which provides that a source material license "may not be issued to the Corporation, if the Commission determines that: (A) The Corporation is owned, controlled or dominated by . . . a foreign corporation." The Board then states that "the language in the [Atomic Energy] Act and in 10 C.F.R. § 40.38 appears to be more or less straightforward," and notes that "[i]t would seem that the type of license Crow Butte has and wishes to amend is a 'commercial license,' which would seem to render its foreign ownership prohibitive of its being granted a license under the Act." For the reasons discussed below, neither Section 103 of the AEA nor 10 C.F.R. § 40.38 apply to Crow Butte's materials license or to its application for an amendment to that license.

As an initial matter, Section 103d. of the AEA only applies to production and utilization facilities. 42 U.S.C. § 2133a. ("The Commission is authorized to issue licenses to persons applying therefore to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use[,] import, or export under the terms of an [Agreement for Cooperation], *production or utilization facilities* for commercial or industrial purposes.") (emphasis added). Utilization facilities include nuclear power reactors,[1] while production facilities generally include enrichment plants. *See* 42 U.S.C. §§ 2014v. (production facility) and 2014cc. (utilization facility). Thus, Section 103d. does not apply to source material licensees such as Crow Butte.[2] Accordingly, the restrictions on foreign ownership in Section 103d. are irrelevant to the license amendment at issue.

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1 Most nuclear power reactors are licensed under Section 103 of the AEA, though some are licensed under Section 104 as research and development reactors.

2 Instead, licenses to possess source material are issued under 10 C.F.R Part 40 pursuant to Chapter 7 of the AEA (42 U.S.C. §§ 2091-2099). Section 62 of the AEA states that no person may, *inter alia*, transfer, possess, or import/export source material without a

With regard to the applicability of 10 C.F.R. § 40.38, that provision was added in 1997 in order to implement the statutory changes to the Atomic Energy Act associated with the USEC Privatization Act (Pub. L. 104-134). The USEC Privatization Act directed the sale of the United States Enrichment Corporation to a private sector entity. According to the Statements of Consideration accompanying the direct final rule, the language in 10 C.F.R. § 40.38 was added to conform to the legislation, which specifically restricted issuance of a certificate or license to USEC if issuance would be inimical to maintenance of a reliable and domestic source of enrichment services. 62 Fed. Reg. 6664, 6665 (Feb. 12, 1997). In any event, the rulemaking also added the definition of "Corporation" to 10 C.F.R. § 40.4. Corporation means "the United States Enrichment Corporation (USEC), or its successor." Thus, by the plain language of 10 C.F.R. § 40.38, the regulation does not apply to Crow Butte or to any uranium recovery facility; it only applies to USEC and its successors. Accordingly, Section 40.38 is irrelevant to the license amendment application at issue in this proceeding.

Moreover, these new issues were not advanced by the petitioners. In ruling on the proposed contention, it is not the Board's role to invent new legal theories for a contention or uncover arguments and support never advanced by the petitioners themselves. *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 457 (2006). Boards may not infer unarticulated bases for contentions; it is the contention's proponent, not the Board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirements for the admission of contentions.[3] *Id.* The Licensing Board is neither

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license from the Commission. Chapter 7 does not contain a prohibition on foreign ownership of source material similar to that in Section 103d.

[3] In *USEC*, the Commission noted that the proposed contentions made a "bare reference" to an NRC regulation "without explaining its significance or establishing any connection

required nor expected to pass upon all items which the Staff must consider before the operating license is issued. *Consolidated Edison Co.* (Indian Point, Units 1, 2 & 3), ALAB-319, 3 NRC 188, 190 (1976). Its role is to assess the proposed contentions as presented by the petitioners in light of the strict contention admissibility standards in 10 C.F.R. § 2.309.

B. Standards Applicable to License Amendment Application Review

In an order dated May 14, 2008, the Board directed the parties "to address in their briefs the question of what standards should be applied, and what are the sources for any standards to be applied, in determining which criteria set forth in 10 C.F.R. § 40.32 are 'applicable' in deciding whether to amend a license under § 40.45, particularly in light of the principle that the standards for amendment of a license are generally the same as those for issuance of an original license."[4] Applications for amendment of a license must specify the respects in which the licensee desires the license to be amended and the grounds for such an amendment. 10 C.F.R. § 40.44. In considering an application by a licensee to amend its license the Commission will apply the applicable criteria set forth in Section 40.32. 10 C.F.R. § 40.45.

As potentially applicable to a uranium recovery facility, the licensing requirements in 10 C.F.R. § 40.32 permit approval of an *initial* application for a specific license if:

a. The application is for a purpose authorized by the Act; and

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to the proffered contention." That is more than petitioners did here. The proposed Contention E made no reference to any NRC regulatory or statutory provisions in support of its contention.

4 We note again that these arguments were not advanced by the petitioners themselves. It is the contention's proponent, not the Board, that is responsible for formulating the contention and providing the necessary information to satisfy the basis requirements for the admission of contentions. *USEC*, CLI-06-10, 63 NRC at 457.

b. The applicant is qualified by reason of training and experience to use the source material for the purpose requested in such manner as to protect health and minimize danger to life or property; and

c. The applicant's proposed equipment, facilities and procedures are adequate to protect health and minimize danger to life or property; and

d. The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.[5]

With respect to an amendment application, all of these provisions would apply as a general matter, although only to the extent that they are implicated by the specific proposed amendment.

The licensing review for an amendment is not a forum for reassessing issues that were resolved in the initial licensing review. For example, the scope of a NEPA environmental review in connection with a facility license amendment is limited to a consideration of the extent to which the action under the amendment will lead to environmental impacts beyond those previously evaluated. *Florida Power & Light Co.* (Turkey Point Nuclear Generating, Units 3 & 4), LBP-81-14, 13 NRC 677, 684-85 (1981), *citing Consumers Power Co.* (Big Rock Point Nuclear Plant), ALAB-636, 13 NRC 312 (1981). This principle is also embodied in NRC Staff guidance, which states: "[f]or amendments, the focus of the review should be on the changes proposed in the amendment [ ]. Reviewers should not review other previously accepted actions if they are not part of the amendment unless the review of the amendment package identifies problems with other aspects of facility operation." NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications," at xvii (June 2003).

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[5] Section 40.32(e) through (g) are inapplicable to uranium recovery facilities. Section 40.32(e) and (g) apply only to enrichment facilities, while Section 40.32(f) applies only to industrial products.

These same principles extend to agency adjudications. A proposed contention must relate to the license amendment which is requested. Petitioners may not challenge the safety of activities already permitted under the license. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981). A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988). Accordingly, any assessment of a proposed contention must focus on whether the proposed contention alleges an issue raised by the amendment application. If not, then the proposed contention is outside the scope of the proceeding.

Here, there is no change in ownership associated with the amendment application. Any challenge related to the ownership of Crow Butte is an impermissible challenge to an activity already permitted under the existing license. Thus, the contention is outside the scope of the narrow license amendment proceeding.

Moreover, in this license amendment proceeding, the common defense and security considerations under 10 C.F.R. § 40.32(d) are not pertinent. Crow Butte does not propose to export the uranium mined at its facility as part of the license amendment application. The Commission has recognized in previous Part 40 license amendment proceedings that, where the amendment does not involve the import or export of nuclear materials, the common defense and security considerations of 10 C.F.R. § 40.32(d) are not implicated. *See Kerr-McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982).

This is consistent with a judicial decision involving an export licensing proceeding that evaluated the phrase "inimical to the common defense and security." There, the court stated that, in the absence of unusual circumstances, the Commission need not look beyond

non-proliferation safeguards in determining whether the common defense and security standard is met. *See NRDC v. NRC*, 647 F.2d 1345, 1363 (D.C. Cir. 1981). Here, no export is authorized by the license amendment and therefore there is no need to even examine non-proliferation safeguards. That is an issue for an export licensing proceeding.[6]

Accordingly, the "inimical to the common defense and security" aspect of 10 C.F.R. § 40.32(d) is applicable to Part 40 license amendments in general, but irrelevant to the instant amendment application.

C. Contention E is Inadmissible

Although Crow Butte continues to maintain that the ownership of Crow Butte is immaterial to the license amendment application in question because the amendment does not involve a change in ownership, Contention E is inadmissible even if the Board finds that it is within the scope of this narrow amendment proceeding.

First, petitioners have articulated no genuine dispute with the applicant that is supported by a factual or evidentiary basis. Petitioners fail to present any facts or data to support the contention. Petitioners do not allege any specific statutory or regulatory violations that require Crow Butte to discuss distribution of its profits or describe its sales of uranium in detail. Instead, petitioners speculate and hypothesize about scenarios without regard for the statutory, regulatory, and treaty-related obligations that apply to source material produced at Crow Butte. Put simply, petitioners' proposed Contention E is vague and unsupported. *See N Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999) (The Commission's

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[6] The statutory and regulatory provisions relating to the export of source material are discussed further below.

procedures do not allow "'the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support.").[7]

Petitioners proposed contention is similar to a contention that was proposed and rejected in the *USEC* licensing proceeding. There, the Commission affirmed a Board order rejecting a proposed contention which argued that the proposed facility would not advance "national security goals" and that "constructing the ACP would encourage other countries to pursue nuclear weapons." *USEC*, CLI-06-10, 63 NRC at 469. The Commission held that the proposed contention's generalized concerns about national security and nonproliferation did not amount to an admissible contention. *Id.*, at 470. The Commission agreed with the Board that the petitioner offered no facts or expert opinion to support its claim that the proposed facility would be inimical to common defense and security. *Id.*

Here, petitioners raise similarly broad and generalized concerns about the amendment. Petitioners state that "Canadian owners may divert the Uranium products to non-US customers such as China, India, Pakistan, North Korea or possibly Iran" and that Cameco may sell to "non-US buyers which may include China, India, Pakistan, North Korea and possibly Iran unless there are Canadian regulations which restrict such sales." Pet. at 25. Petitioners cite no regulations or statutory requirements in support of their position. Rather, they are articulating

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[7] The non-proliferation credentials of Canada cannot be seriously questioned, nor can its important foreign policy relationship with the United States. Among other things, Canada supports the International Atomic Energy Agency ("IAEA") safeguards, is a member of the Nuclear Suppliers Group, and is a signatory to numerous international treaties and conventions relative to non-proliferation and nuclear safety, including the Treaty on Non-Proliferation of Nuclear Weapons, the Convention on Early Notification of a Nuclear Accident, and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Moreover, Canada entered into an Agreement for Cooperation on Civil Uses of Atomic Energy with the United States in 1955.

a policy preference that does not raise a litigable issue in this proceeding. Such generalized and unsupported concerns cannot support an admissible contention.

Second, the export of source material produced at Crow Butte is in any event outside the scope of this license amendment proceeding. Except in limited circumstances, distribution of source material requires an export license. *See* 42 U.S.C. § 2094 (requiring an export license generally, but authorizing the Commission to cooperate with foreign nations to distribute source material pursuant to an Agreement for Cooperation or to distribute up to three metric tons per year per recipient of source material to other nations). The NRC implements its statutory obligation with respect to source material through 10 C.F.R. § 40.51, which states in relevant part that no licensee shall transfer source material to any person abroad except pursuant to an export license issued under 10 C.F.R. Part 110. To the extent that petitioners proposed contention is based on the export of uranium mined at Crow Butte, it raises an issue that is outside the scope of this license amendment proceeding, which only authorizes possession and use or source material — not the export of the source material.

Third, the argument that Crow Butte is a Canadian-owned company does not raise any genuine issue. As already noted, there is no prohibition on the mere fact of Canadian ownership of a uranium mining operation. Moreover, the assertions regarding profits and losses are not financially sound. As discussed above, Crow Butte is a U.S. company; Cameco has a majority of U.S. stakeholders; and uranium produced at the Crow Butte facility will benefit U.S. utilities.[8] In this context, there simply is no genuine dispute to litigate.

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[8] Further, there is no statutory or regulatory requirement that an applicant demonstrate any particular benefit (local, domestic, or other benefit) from a license amendment. *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 35 (2002). Because there is no benefit-cost

For these reasons, Contention E is inadmissible even if the Board finds that ownership issue is material to the narrow license amendment proceeding.

D. Petitioners Lack Standing for Contention E

In LBP-08-06, the Board found that three Petitioners had standing with respect to Contentions A, B, and C. In each case, standing was premised upon an injury related to water contamination (surface or ground water). WNRC's standing was based on possible groundwater contamination at the Anders well. Standing for Owe Aku was premised on the possibility of contamination at the House well. And, standing for Ms. White Plume was based on the possibility of groundwater contamination and/or surface water contamination. Petitioners did not assert, nor did the Board find, standing related to ownership of Crow Butte, export of source material, or proliferation concerns.

In the absence of a demonstration of standing, Contention E cannot be admitted. A petitioner must establish standing for every single claim. Merely establishing standing for one claim does not grant a petitioner standing for all contentions. *See Friends of the Earth, Inc.* v. *Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 185 (2000) ("Laidlaw is right to insist that plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis* v. *Casey,* 518 U.S. 343,358 n.6 (1996) ("[S]tanding is not dispensed in gross."); *Friends of the Earth, Bluewater Network Div.* v. *U.S. Dept. of Interior,* 478 F.Supp.2d 11, 16 (D.D.C. 2007) (holding that certain organizations challenging site-specific agency actions had limited or no standing because they did not identify a single member who could prove he had suffered injury-in-fact at

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analysis involved in NRC's determination to grant or deny a license amendment application under the AEA, there necessarily is no relief that can be granted petitioners even assuming *arguendo* that there is no benefit to the requested license amendment. *See id.*, at 36. Thus, the proposed contention is inadmissible.

particular parks); *L.A.* v. *Lyons,* 461 U.S. 95, 103, 106 (1983). Because the injuries relied upon by the Board for standing related only to groundwater and surface water impacts, there is no asserted injury, causation, or redressability associated with foreign ownership. For this reason alone, Contention E cannot be admitted.

Moreover, even if petitioners had alleged some injury based on nonproliferation or foreign ownership, that would not support the particularized showing of harm needed to support an injury-in-fact. A generalized interest in minimizing danger from proliferation is insufficient to confer standing. *See Transnuclear Inc.* (Export of 93.15% Enriched Uranium), CLI-94-1, 39 NRC 1, 5 (1994); *see also, Dellums v. NRC,* 863 F.2d 968, 972 (D.C. Cir. 1988) (stating that "opposing nuclear proliferation and ensuring proper safeguards for nuclear energy" is only a generalized goal). The petitioners fail to show any evidence of a specific threat to national nonproliferation objectives and do not go beyond mere speculations and unsupported and undefined potential threats.[9] *See U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 365 (2004). This is inadequate to support the concrete and particularized injury that is needed to support standing.

The generalized concern regarding Crow Butte's ownership is also unrelated to the specific license amendment at issue. In *University of Missouri,* petitioners argued that the TRUMP-S project would increase the risk of nuclear weapons proliferation and would therefore

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[9] Even if the contention could be read to encompass the potential for violation of national and international agreements on nonproliferation, the Commission has held that its responsibility for considering the possibility of diversion as one aspect of protecting common defense and security does not establish that diversion would cause any concrete personal or direct harm that would entitle them to participate in a hearing. *Edlow International* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 577 (1976).

be inimical to the common defense and security. *Curators of the University of Missouri* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 394 (1995). The Commission disagreed, noting that intervenors failed to show weapons proliferation was reasonably related to, and would arise as a direct result of, the specific license amendments at issue. *Id.* Similarly, petitioners here have not shown how proliferation issues are implicated by the mining of uranium at the current operations or at North Trend. The absence of a direct link is particularly glaring in light of the myriad of other statutory and regulatory programs governing the export of source material and international non-proliferation agreements.[10]

Lastly, to the extent that petitioners would base standing on profits from the sale of mined uranium accruing to a foreign company, any injury would lie outside the zone of interests of the NRC's governing statutes. *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, 56 NRC 317, 336-37 (2002) (holding, in denying standing, that the "zone of interests" test for standing in an NRC proceeding does not encompass economic harm that is not directly related to environmental or radiological harm); *see also International Uranium (USA) Corp.* (Receipt of Material from Tonawanda, New York), CLI-98-23, 48 NRC 259, 265 (1998) (rejecting standing for petitioners who asserted a economic injury, unlinked to any specific radiological harm).

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[10] In this regard, petitioners do not even claim to have fully investigated the export requirements or international nonproliferation agreements with regard to either the U.S. or Canada. Instead, the proposed contention alleges that Canada may sell to certain countries "unless there are Canadian regulations which restrict such sales." Pet. at 25. Petitioners fail to even mention, much less discuss, the national and international frameworks that govern the export and transfer of source material.

Thus, petitioners have failed to establish sufficient injury, causation or redressability to confer standing for proposed Contention E. Accordingly, this proposed contention cannot be admitted.

CONCLUSION

For the all foregoing reasons, proposed Contention E should not be admitted in this proceeding.

Respectfully submitted,

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Dated at Washington, District of Columbia
this 23rd day of May 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment Application for North Trend Expansion Project)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "APPLICANT'S BRIEF REGARDING FOREIGN OWNERSHIP ISSUES" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 23rd day of May 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

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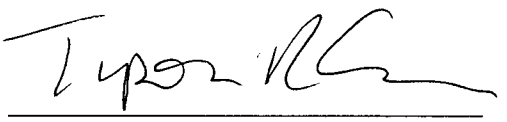

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