

BEFORE THE
U.S. NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of
COGEMA MINING, INC.
(Christensen & Irigaray Ranch
Facilities)

Docket No. 40-08502-MLR
ASLBP No. 09-887-01-MLR-BD01
Renewal of License SUA-1341

June 2, 2009

**LEGAL SIGNIFICANCE OF CROW BUTTE DECISION IN THIS
PROCEEDING**

In its Order dated May 21, 2009, the Atomic Safety and Licensing Board asked the parties to “submit a legal brief, specifying their interpretation concerning the impact and significance of the Commission’s recent decision in *Crow Butte*, CLI-09-09, 69 NRC ___ (slip. op.) on the standing and admissibility of contentions presented in this case.” May 21, 2009 Order at 5. Powder River Basin Resource Council (PRBRC) hereby submits our response.

Although most of Commission decision CLI-09-09 (hereafter “decision” or “Crow Butte decision”) is largely irrelevant to PRBRC’s specific standing bases and most of our proffered contentions, the decision raises several significant questions directly related to our petition, including:

- 1) What is a petitioner’s burden to demonstrate standing?
- 2) Are past environmental compliance issues relevant to license renewal proceedings?
- 3) Should COGEMA be required to update its background information on local geology?
- 4) Does issuing a source materials license to a company controlled by foreign

interests “raise questions of whether the license is ‘inimical’ to the common defense and national security”¹

Each of these issues will be discussed in turn.

I. Relevance of Crow Butte Decision for PRBRC’s Standing Claims

The Commission decision thoroughly discusses standing issues and this discussion is particularly relevant to this proceeding as the Crow Butte decision also concerned a petition regarding a renewal of a source materials license for an in-situ leach (ISL) uranium facility.

The Crow Butte decision specifies that to demonstrate standing, a petitioner merely must show a “plausible pathway by which petitioners could be harmed.”² Standing is a threshold matter of any petition but it is a procedural issue – not one that necessarily goes to the substance of various contentions.

As discussed in our April 10, 2009 petition, PRBRC is a nonprofit organization that has members that live and work in the Powder River Basin, including Campbell and Johnson Counties where COGEMA plans to re-start its ISL operations. In this case, PRBRC has demonstrated a “plausible pathway” by which the organization and its members “could be harmed,” including groundwater consumption,³ decreased water quality from aquifers used for domestic and stock purposes,⁴ reduced air quality,⁵ and impacts to wildlife and wildlife habitat, which present recreational opportunities for PRBRC members.⁶

¹ Crow Butte Decision at 35.

² Crow Butte Decision at 17

³ PRBRC petition at 6.

⁴ *Id.*

⁵ *Id.* at 9.

⁶ *Id.* at 7-8.

Additionally, requiring compliance with applicable laws and regulations, implementing license restrictions to mitigate impacts, or even denying the license renewal application, will “alleviate [the] potential injury”⁷ we allege. Therefore, we have shown “a nexus between the injury and the relief” sought.⁸

II. Significance of Crow Butte Decision Discussion of Environmental Contention E: Past Environmental Practices

The Crow Butte decision is also relevant for PRBRC contention 1B which alleged that the application needs to disclose “COGEMA’s compliance history, including documentation of past spills, underground excursions, and evaporation pond liner leaks.”⁹ We contended in our petition that “This compliance history is a key indicator of COGEMA’s future ability to protect public health and the environment.”¹⁰

In the Crow Butte decision, the Commission held that “[t]o raise an admissible issue, [a]llegations of management improprieties... must be of more than historical interest”¹¹ and a petition must “demonstrate an ‘ongoing pattern of violations or disregard of regulations that might be expected to [recur] in the future.’”¹²

In contrast to the contention that was at issue in the Crow Butte case, which involved one violation of a state permit, here we have a long history of compliance issues that are likely to be repeated. NRC staff acknowledges that there are “over 2500 public

⁷ Crow Butte Decision at 10.

⁸ *Id.* (Holding “For practical purposes, if denying a license amendment would alleviate a petitioner’s potential injury, *Yankee Rowe* would allow that petitioner to prosecute any admissible contention that could result in the denial of the license amendment, regardless of whether the contention was directly related to that petitioners’ articulated ‘injury.’”)

⁹ PRBRC petition at 3.

¹⁰ *Id.*

¹¹ Crow Butte Decision at 30, *quoting Georgia Tech*, CLI-95-12, 42 NRC at 120.

¹² Crow Butte Decision at 30, *quoting USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 464 (2006).

documents documenting more than thirty years of history relating to license SUA-1341.”¹³ Over the years, there have been numerous and recurring excursions, spills, and other issues at this ISL facility. Although we admit that some of this information is publicly available through the NRC website or other mechanisms, we contend that this information was improperly omitted from this application as it is highly relevant to the Applicant’s ability to comply with license conditions and applicable laws and regulations.

III. Significance of Crow Butte Decision Discussion of Technical Contention F: Failure to Include Recent Research

In the Crow Butte decision, the Commission held that “the reliability of the data concerning the geology and hydrology of the area on which and around Crow Butte’s operation is within the scope – in fact, at the center – of this license renewal proceeding.”¹⁴

This analysis is highly relevant to the admissibility of PRBRC contention 1A that the application “is lacking a complete description of local hydrogeology.” Other contentions also discuss the failure to include new information and scientific analysis. While we acknowledge that the application does contain some information regarding local hydrogeology, we contend that this information is nowhere near complete and is outdated. In particular, the application does not discuss cumulative impacts from current and planned coalbed methane operations relating to aquifer characteristics and human-induced fracturing. Instead, the application relies on incorporating by reference decades-old analysis that does not consider changes in circumstances. Thus, here, we have the same situation as was before the Commission in the Crow Butte case, and the reliability

¹³ NRC response to PRBRC petition at 14.

¹⁴ Crow Butte Decision at 34

of data should be a valid issue in this proceeding as it was in the Crow Butte proceeding.

IV. Significance of Crow Butte Decision Discussion of Miscellaneous Contention K: Foreign Ownership

The Commission held that “Materials license regulations...contain no express prohibition [on foreign ownership], but require the Staff to make a finding that the issuance of the license ‘will not be inimical to the common defense and security.’”¹⁵

Though we may disagree that there is not a prohibition on foreign ownership of NRC licensed uranium facilities,¹⁶ we agree that the standard to be considered is whether the license will “be inimical to the common defense and security” as this phrase is used in relevant NRC regulations.

The contentions at issue in the Crow Butte case were based on export issues (which the Commission said would be discussed in a separate proceeding). While we are also concerned about uranium getting into the wrong hands and the implications this may have on global security, our primary basis for bringing contention 2 of our petition is a concern regarding appropriate capitalization of the U.S. subsidiary when the operations are controlled by a foreign entity.¹⁷ Improper capitalization impacts financial assurance (see also Contention 10) and the company’s ability to pay for any future fines related to environmental compliance issues. There is no discussion in the application about the cash resources of the U.S. subsidiary and whether these resources are sufficient to cover financial assurance requirements for bonding and reclamation. To the extent that the U.S. subsidiary is not properly capitalized, this leaves the public at risk (both financially and environmentally) and would be contrary to the interests of the United States and our

¹⁵ Crow Butte Decision at 36, *quoting* LBP-08-24, 68 NRC __ (slip op. at 74), citing 10 C.F.R. § 40.32(d).

¹⁶ We understand that the petitioners in the Crow Butte case filed an appeal to the U.S. Court of Appeals for the 8th Circuit on this very topic.

¹⁷ Admittedly, we did not disclose this rationale in our petition and we regret the error.

common defense and security. These issues were not discussed in the Crow Butte decision and we believe they would be proper to consider in this proceeding.

CONCLUSION

In short, we believe that Commission decision CLI-09-09 is favorable to our positions and contentions and we look forward to the Board's review of the decision as applied in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing brief describing the legal significance of the Crow Butte Commission decision, dated June 2, 2009, have been served upon the following persons by Electronic Information Exchange.

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Dated at Sheridan, Wyoming
this 2nd day of June 2009

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