

June 2, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
COGEMA MINING, INC.	)	Docket No. 40-8502-MLA
	)	
(Christensen & Irigaray Ranch Facilities)	)	ASLBP No. 09-887-01-MLR-BD01
	)	

NRC STAFF'S BRIEF REGARDING THE IMPACT AND  
SIGNIFICANCE OF THE COMMISSION'S DECISION IN CLI-09-09

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Order of May 21, 2009,<sup>1</sup> the NRC Staff submits this brief regarding the impact and significance of the Commission's decision in *Crow Butte*<sup>2</sup> on the standing and admissibility of contentions presented in this case.

BACKGROUND

On May 18, 2009, the Commission issued a memorandum and order on two appeals in the *Crow Butte Resources, Inc.* license renewal proceeding.<sup>3</sup> Specifically, the Commission's decision addressed appeals of the Atomic Safety and Licensing Board's ("CB Board") decisions in LBP-08-24<sup>4</sup> and LBP-08-27<sup>5</sup> which granted a hearing to several petitioners and admitted a

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<sup>1</sup> *COGEMA Mining, Inc.* (Irigaray and Christensen Ranch Facilities), LBP-09-887, 69 NRC \_\_\_\_ (slip op.) (May 21, 2009) ("Order").

<sup>2</sup> *Crow Butte Resources, Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC \_\_\_\_ (slip op.)

<sup>3</sup> *Id.*

<sup>4</sup> LBP-08-24, 68 NRC \_\_\_\_ (Nov. 21, 2008) (slip op.).

<sup>5</sup> LBP-08-27, 68 NRC \_\_\_\_ (Dec. 10, 2008) (slip op.).

late-filed contention regarding the effects of arsenic, respectively. The Staff and Crow Butte appealed LBP-08-24 on the grounds that the hearing requests should have been denied entirely,<sup>6</sup> while Petitioner Oglala Delegation of the Great Sioux Nation appealed the CB Board's denial of party status.<sup>7</sup> Additionally, the Consolidated Petitioners filed a petition for review of the CB Board's rejection of several proposed contentions in LBP-08-24.<sup>8</sup> The NRC Staff and Crow Butte appealed the CB Board's ruling in LBP-08-27 that admitted a late-filed contention concerning the impacts of arsenic contamination.<sup>9</sup>

On May 21, 2009, the Board in this proceeding issued an Order giving the parties an opportunity to "submit a legal brief, specifying their interpretation concerning the impact and significance of the Commission's recent decision in *Crow Butte* [] on the standing and admissibility of contentions presented in this case."<sup>10</sup> The Staff provides herein its interpretation of the impact and significance of the Commission's decision in CLI-09-09 on standing and the admissibility of contentions presented in this case.

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<sup>6</sup> *NRC Staff's Notice of Appeal of LBP-08-24, Licensing Board's Order of November 21, 2008, and Accompanying Brief* (Dec. 10, 2008); and *Crow Butte Resources' Notice of Appeal of LBP-08-24* (Dec. 10, 2008).

<sup>7</sup> *Petitioner's Election to Participate and Notice of Appeal* (Dec. 10, 2008).

<sup>8</sup> *Consolidated Petitioners' Brief in Support of Appeal from LBP-08-24* (Dec. 10, 2008).

<sup>9</sup> *Crow Butte Resources' Notice of Appeal of LBP-08-27* (Dec. 18, 2008); *NRC Staff's Notice of Appeal of Licensing Board's Order of December 10, 2008 (LBP-08-27), and Accompanying Brief* (Dec. 22, 2008).

<sup>10</sup> Order at 5.

ANALYSIS

I. Standing

A. Treaty Claims

In CLI-09-09, the Commission affirmed the CB Board's decision rejecting the Oglala Sioux Tribe's ("Tribe") and the Oglala Delegation of the Great Sioux Nation's ("CB Delegation") claims of standing under the 1868 Fort Laramie Treaty because the treaty is no longer in effect.<sup>11</sup> Because the Fort Laramie treaty is the only basis upon which the CB Delegation based its standing, the Commission held that the CB Delegation does not have standing as a party in the *Crow Butte* proceeding, but may still participate as an interested governmental entity.<sup>12</sup> The Staff did not take a position on whether the CB Delegation was an interested governmental entity, but did not object to their participation in that proceeding because such participation would be in conjunction with the Tribe.<sup>13</sup>

Based on the Commission's ruling in *Crow Butte*, the claims of standing set forth by petitioner Oglala Delegation of the Great Sioux Nation Treaty Council ("Delegation") based on the reasoning that the facility is located on land recognized as the territory or property of the Sioux Nation under the terms of the 1851 and 1868 Fort Laramie Treaties should be dismissed. The Commission clearly states that "the Fort Laramie Treaty is no longer in effect." As such, the Board should dismiss the Delegation's claims of standing based on these claims.

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<sup>11</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 6).

<sup>12</sup> *Id.*

<sup>13</sup> See Transcript of Oral Argument in *Crow Butte Resources, Inc.* license renewal proceeding (Docket No. 40-8943) held on Oct. 1, 2008, 425:1-11.

B. Interest in Cultural Resources

The Commission affirmed the CB Board's finding that the Tribe demonstrated standing based, in part, on their current, concrete interest in protecting artifacts on the site.<sup>14</sup> This interest was based on the "undisputed" fact that "the Crow Butte operation sits on the Tribe's aboriginal land" and that the Crow Butte application identified "eight archeological sites within the project area that are Native American in origin."<sup>15</sup> In addition, the CB Board granted standing to the Tribe in an effort to preserve the Tribe's procedural interest in being consulted with respect to the significance of these artifacts.<sup>16</sup> The Commission did not disturb the CB Board's decision to preserve this procedural right based on the alleged past failure of the Staff to consult with the Tribe.<sup>17</sup>

Unlike the situation in *Crow Butte* where the license application identified eight archeological sites within the project area that are Native American in origin, the COGEMA application identifies no archeological sites of Native American origin.<sup>18</sup> Furthermore, the Delegation has not identified any cultural resources or artifacts related to their heritage on the COGEMA site. The CB Board noted "that several federal statutes recognize that Indian Tribes have an interest in artifacts related to their heritage."<sup>19</sup> The Delegation has not, however,

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<sup>14</sup> *Id.* at 8.

<sup>15</sup> *Id.* at 6-7.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> See Letter from Tom Hardgrove, Manager, Environmental & Regulatory Affairs, COGEMA, to Bill von Till, Branch Chief, Uranium Recovery Licensing Branch, NRC, section 2.4, dated May 30, 2008 (ADAMS Accession No. ML081850689) ("Application").

<sup>19</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 7) (citing LBP-08-24, 68 NRC \_\_\_\_ (slip op. at 22) (internal (continued. . .)

demonstrated a current, concrete interest in protecting artifacts on the site and standing should not be granted to the Delegation on this basis.

C. Representational Standing

The Commission remanded the CB Board’s decision to grant representational standing to Owe Aku/Bring Back the Way (“Owe Aku”) and Western Nebraska Resources Council (“WNRC”) based on affidavits filed in the North Trend Expansion Area (“NTEA”) proceeding.<sup>20</sup> The Commission held that NRC case law requires an organization to submit written authorization from a member whose interests it purports to represent in order to have a “concrete indication” that the member wishes to have the organization represent his interests in that proceeding.<sup>21</sup> Because this rule has not been set forth in NRC regulations, the Commission remanded the issue, allowing the CB Board to give Oke Aku and WNRC an opportunity to submit affidavits in the license renewal proceeding.<sup>22</sup>

The Commission’s ruling in *Crow Butte* is directly applicable to the instant proceeding. In its request for hearing, Petitioner Powder River Basin Resource Council (“PRBRC”) failed to submit any affidavits from its members authorizing organizational representation.<sup>23</sup> Similarly, Chief Oliver Red Cloud also failed to submit an affidavit authorizing the Oglala Delegation to

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(. . .continued)

(citations omitted)).

<sup>20</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 11-15).

<sup>21</sup> *Id.* at 13.

<sup>22</sup> *Id.* at 15.

<sup>23</sup> See *Powder River Basin Resource Council Request for Hearing* (April 10, 2009) (“PRBRC Petition”).

represent him in this proceeding.<sup>24</sup> Although the Delegation attempted to correct this deficiency in their May 28, 2009 filing, the affidavit submitted by Chief Oliver Red Cloud authorizes the “Black Hills Sioux Nation Treaty Council (‘the Delegation’)”<sup>25</sup> rather than the “Oglala Delegation of the Great Sioux Nation Treaty Council (‘Oglala Delegation’)” as stated in the Delegation’s pleadings.<sup>26</sup> Additionally, Chief Oliver Red Cloud’s May 2009 affidavit fails to allege a concrete and particularized interest sufficient to support a claim of representational standing.<sup>27</sup> As such, the Board should deny both petitioners representational standing in this proceeding.

## II. Contention Admissibility

### A. Consultation Regarding Properties of Potential Cultural Significance

In reversing the CB Board’s admission of Environmental Contention B, consultation concerning properties of potential cultural significance, the Commission explained that while consultation with the Tribe is material and within the scope of this license renewal proceeding, the matter is not yet ripe.<sup>28</sup> The Commission held that the Tribe must defer its contention until the NEPA review is complete.<sup>29</sup> As in *Crow Butte*, the Staff has not yet completed its NEPA review of the COGEMA license renewal. Upon completion of the NEPA review, petitioners are entitled to raise late-filed “contentions on the basis of the draft or final environmental impact

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<sup>24</sup> See Oglala Delegation of the Great Sioux Nation Treaty Council, *Request for Hearing and Petition for Leave to Intervene* (April 10, 2009) (“Delegation Petition”).

<sup>25</sup> *Affidavit of Chief Oliver Red Cloud* (May 28, 2009).

<sup>26</sup> See *Petitioner’s Memorandum Re: Order Dated May 21, 2009* (May 28, 2009); and Delegation Petition.

<sup>27</sup> See *Consumers Energy Co. (Palisades)*, CLI-07-08, 65 NRC 399, 408-09 (2007).

<sup>28</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 24).

<sup>29</sup> *Id.*

statement where that document contains information that differs ‘significantly’ from the information that was previously available.”<sup>30</sup> Based on the Commission’s decision in *Crow Butte*, the Board should dismiss petitioners’ contentions regarding consultation concerning properties of potential cultural significance.

B. Failure to Consider Economic Value of Environment in Cost/Benefit Analysis

In their petition, the *Crow Butte* Consolidated Petitioners argued that the application was deficient because it failed to consider the economic value of wetlands in describing the “no action” alternative (*i.e.*, not renewing the license).<sup>31</sup> In its appeal, the Staff argued that there was no need for the application to discuss the economic value of restoring wetlands because the ongoing operation has no effect on wetlands.<sup>32</sup> Persuaded by the Staff’s argument, the Commission reversed the CB Board’s decision to admit this contention because it did not raise a genuine dispute with the application.<sup>33</sup> Specifically, the Commission noted that “the contention does not claim that the licensed operation has adversely affected wetlands, either within or outside of the area covered by the license.”<sup>34</sup> The Commission clarified that

[u]nless Consolidated Petitioners present a genuine dispute regarding whether wetlands *have been or will be adversely affected by the existing operation*, there can be no need for *Crow Butte* to consider the economic benefits that might accrue from restoring them.”<sup>35</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 31.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 32.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (emphasis added).

In the instant proceeding, the Delegation contends that the “cost and benefits discussion in the Application omits any discussion of the economic value [of] environmental benefits of the 18 watersheds associated with the Willow Creek.”<sup>36</sup> As with the discussion of wetlands in the *Crow Butte* proceeding, the Staff does not deny that if there was an impact to the identified watersheds in the area, the Staff would conduct a value assessment as part of the Staff’s NEPA analysis.<sup>37</sup> The Delegation does not, however, allege that COGEMA’s continued operation would degrade the quality of the watersheds. In light of the Commission’s decision in *Crow Butte*, the Board should reject the Delegation’s contention regarding the economic value of environmental benefits because they fail to raise a genuine dispute with the Application.

#### C. Failure to Include Recent Research

The Commission affirmed the CB Board’s decision to admit Consolidated Petitioners’ Technical Contention F, which stated that the application’s description of the geology and seismology of the area did not include up-to-date research on the subject.<sup>38</sup> The Commission noted that Consolidated Petitioners cited portions of the *Crow Butte* application that used research from the 1980s and provided expert opinion and supporting documentation to show that the research was outdated.<sup>39</sup> In its ruling, the Commission emphasized that “the reliability of the data concerning the geology and hydrology of the area on which and around Crow Butte’s

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<sup>36</sup> Delegation Petition at 117.

<sup>37</sup> See Staff’s Response to Delegation at 46.

<sup>38</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 34).

<sup>39</sup> *Id.* at 32-33. Consolidated Petitioners presented the expert opinion of Hannan E. LaGarry, Ph.D. and cited a November 8, 2007 Nebraska Department of Environmental Quality (“NDEQ”) letter “which raised the same concern that Crow Butte was not considering recent information that contradicts some of its statements describing the local geology and which addresses the question of whether the mined aquifer is adequately confined.” *Id.* at 33.



operation is within the scope – in fact, at the center – of this license renewal proceeding.”<sup>40</sup>

Both PRBRC and the Delegation assert that the Application must contain recent research and analysis.<sup>41</sup> Unlike in *Crow Butte* where the Consolidated Petitioners provided expert opinion and supporting documentation, Petitioners have not provided any expert opinion or factual documentation to demonstrate that the research relied upon in the COGEMA Application is outdated or incorrect.<sup>42</sup> As such, the Board should reject Petitioners’ contentions regarding the failure to include recent research because they do not raise a genuine dispute with the Application.

#### D. Foreign Ownership

The CB Board admitted Miscellaneous Contention K regarding foreign ownership with respect to two questions: “First, is there an absolute prohibition on issuing a source material license to a company controlled by foreign interests? And, if not, does the foreign ownership raise questions of whether the license is ‘inimical’ to the common defense and national security?”<sup>43</sup> With respect to the first question, the Commission noted that there is no statutory or regulatory bar on foreign ownership or control of a source material license, whether as a licensee or as a parent entity.<sup>44</sup> The Commission found that the admission of the CB Board’s

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<sup>40</sup> *Id.* at 34.

<sup>41</sup> PRBRC Petition at 4-5 (regarding the need for the Application to contain results and analysis from recent wildlife surveys); and Delegation Petition at 110 (asserting that 10 C.F.R. § 51.60(a) requires the Applicant to “update research and analysis and not merely incorporate the old 1996 data without verifying that there have been no changes in geologic interpretations or hydrologic circumstances”).

<sup>42</sup> See Delegation Petition; and PRBRC Petition.

<sup>43</sup> LBP-08-24, 68 NRC \_\_\_\_ (slip op. at 66-67).

<sup>44</sup> CLI-09-09, 69 NRC \_\_\_\_ (slip op. at 38).

second question was unsupported.<sup>45</sup> Specifically, the Commission found that the Consolidated Petitioners failed to show any basis why renewing the license would be “inimical” to the common defense and security.<sup>46</sup> As such, the Commission held that the Board erred in admitting Consolidated Petitioners’ Miscellaneous Contention K regarding foreign ownership.<sup>47</sup>

In light of the Commission’s decision in *Crow Butte*, the Board should dismiss both Petitioners’ contentions regarding foreign ownership. As stated above, the Commission affirmed that there is no regulatory bar on foreign ownership or control of a source material license, whether as a licensee or as a parent entity.<sup>48</sup> As such, Petitioners’ assertions that foreign governmental ownership bars the issuance of a source material license are unsupported. Further, as in *Crow Butte*, the Petitioners have not presented any basis upon which this Board could find that the renewal of the COGEMA’s license would be inimical to the common defense and security. The Board should reject Petitioners’ contentions regarding foreign ownership for failure to tender an admissible contention.

#### E. Arsenic

The Commission found that the CB Board erred in admitting Consolidated Petitioners’ late-filed contention regarding the health effects of arsenic exposure because they failed to demonstrate a genuine dispute within the scope of the license renewal proceeding.<sup>49</sup> The Commission held that the contention was based on the fundamental premise that *Crow Butte*’s

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 39.

<sup>48</sup> *Id.* at 38.

<sup>49</sup> *Id.* at 39.

licensed activities exposed petitioners and others to arsenic.<sup>50</sup> The Consolidated Petitioners failed, however, to provide any alleged facts or expert opinions to support this proposition.<sup>51</sup> Furthermore, the Commission held that the Consolidated Petitioners' supporting arguments were "speculative" and did "not form the basis for a litigable contention."<sup>52</sup>

As in the *Crow Butte* proceeding, the Delegation asserts that the Applicant's licensed activities have exposed petitioners and others to arsenic without providing any data to support this proposition.<sup>53</sup> In fact, the Delegation references the same article it cited in the *Crow Butte* proceeding from the Journal of American Medical Association regarding the potential association between inorganic arsenic exposure and Type 2 diabetes.<sup>54</sup> Without providing some explanation linking the data in the study with the conditions present at the site, the Delegation's arguments remain speculative and do not form the basis for a litigable contention. The Board should reject Petitioners' contentions regarding arsenic contamination because they fail to demonstrate a genuine dispute within the scope of this proceeding.

#### CONCLUSION

In light of the Commission's decision in the *Crow Butte* license renewal proceeding, CLI-09-09, the Staff respectfully submits that PRBRC and the Delegation should be denied standing in this proceeding. Additionally, the Staff submits that Petitioners' contentions regarding the alleged failure to consult regarding properties of potential cultural significance, the alleged

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<sup>50</sup> *Id.* at 41.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 42.

<sup>53</sup> See Delegation Petition at 98-110.

<sup>54</sup> *Id.* at 99.

failure to consider the economic value of the watershed, the alleged failure to include recent research, foreign ownership, and arsenic should be rejected.

Respectfully submitted,

**Executed in Accord with 10 CFR 2.304(d)**

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Dated at Rockville, Maryland  
this 2<sup>nd</sup> day of June 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S BRIEF REGARDING THE IMPACT AND SIGNIFICANCE OF THE COMMISSION'S DECISION IN CLI-09-09" in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 2<sup>nd</sup> day of June 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the above captioned proceeding.

**Executed in Accord with 10 CFR 2.304(d)**

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