

June 1, 2009 (11:22am)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

Before Administrative Judges:  
Michael M. Gibson, Chairman  
Dr. Richard F. Cole  
Mr. Brian K. Hajek

In the Matter of  
  
CROW BUTTE RESOURCES, INC.  
(License Renewal In Situ Leach Facility,  
Crawford, NE)

Docket No. 40-8943  
ASLBP No. 08-867-02-OLA-BD01

June 1, 2009

**INTERVENORS' MOTION AND APPLICATION FOR  
STAY PENDING APPEAL**

Pursuant to 10 CFR §2.323(a), Intervenor's file by this motion<sup>1</sup> an application to stay this proceeding pending resolution of the appeal of the Oglala Sioux Tribe and the Intervenor's from the Commission's ruling in CLI-09-09, except that such stay should not interfere with the perpetuation of testimony of Aloysius Weasel Bear should Safety Contention A (Arsenic) be re-admitted after the appeal is resolved.

Petitioners hereby move that this Board issue an Order: (1) staying this proceeding until the appeals from CLI-09-09 are finally resolved, including a stay of this Board's Order dated May 27, 2009 (other than the part regarding the filing of affidavits for David House and Francis Anders); (2) allowing for the perpetuation of the testimony of Aloysius Weasel Bear during the period of the stay in case Safety Contention A is re-admitted after the appeal; and (3) including such other Orders as the Board finds to be

<sup>1</sup> Pursuant to Regulation 2.323, the undersigned emailed over the weekend and had a telephone conversation with each of Counsel for Applicant and Counsel for the NRC Staff. Brett Klukan for the NRC Staff stated that the NRC Staff would review the motion when it was received, would not take a position on the motion at this time and would respond to the motion after reviewing it. Tyson Smith for Applicant stated that Applicant would oppose the motion.

necessary or appropriate in the interests of justice and developing a sound record in this proceeding, as contemplated below.

### DISCUSSION

1. Need for Stay. Intervenors would be severely prejudiced in the event that this proceeding is allowed to continue during the pendency of the appeal. This is because the findings in CLI-09-09, especially denying the admissibility of Environmental Contention B, Miscellaneous Contention G, Miscellaneous Contention K and Safety Contention A, as implemented by the Board's Order dated May 27, 2009, causes a dramatic change in the nature and scope of the proceeding. For example, the mandatory disclosures are now limited to the admitted contentions. The oral argument scheduled for June 11<sup>th</sup> and briefing on the merits from January-February 2009 has been made irrelevant.

If the stay is not granted, then there is a high likelihood that there will be waste in this proceeding because if the appeal overturns all or part of CLI-09-09, the parties will have to back-track to re-integrate the re-admitted contentions into the proceeding and catch up on disclosures related to such contentions.

If the proceeding were allowed to continue prior to resolution of the appeal, Intervenors would be irreparably harmed because they would be foreclosed from raising issues related to the denied contentions until the appeal is resolved and by that time, the proceeding would have progressed to a point that matters such as mandatory disclosures would have to be redone. Further, if the appeal reverses the Commission, Miscellaneous

Contention K would be dispositive and potentially 'fatal' to the license renewal.

Therefore, the foreign ownership legal issue must be finally and fully resolved before this proceeding continues.

2. No Prejudice to Other Parties. Since the Crow Butte mine continues to operate under an automatic extension, its operations will continue during the pendency of the stay and, therefore, there is no prejudice to Applicant. In addition, since appeals are a regular part of this litigation process, they are to be expected and so there is no prejudice to the NRC Staff. The Oglala Sioux Tribe has likewise filed an appeal and the undersigned has been informed that the Oglala Delegation of the Great Sioux Nation Treaty Council does not object to the stay.

3. Other Factors. Because the appeal is from a Commission ruling on issues of first impression, it is not possible to make a showing that Intervenors are likely to prevail on the merits. Finally, the public interest lies in favor of staying the proceeding pending resolution of the appeal both in order to foster public confidence in the integrity of the NRC licensing process and to foster conservation of parties' and ASLBP and judicial resources.

4. Motion to Stay May Be Issued by Court of Appeal. In the event that this Board denies this motion to stay, Intervenors shall be entitled to file a motion to stay before the Court of Appeals, for the same reasons as described above. Federal Rules of Appellate Procedure (FRAP) 18 requires that before a motion for stay pending review is filed with the Court of Appeals, a petitioner is required to first make a motion before the agency for a stay pending review of its order. Accordingly, Intervenors have filed this

motion as contemplated by NRC Regulations, 10 CFR §2.323 & §2.342. Section 2.342 provides that this motion/application may be filed with the Commission or the presiding officer but not both. Accordingly, this motion has been filed with the Board. In the event that the applied for stay is not granted, Intervenors (as petitioners in the appeal) will file a motion to stay with the Court of Appeals under FRAP 18(a)(2).

### CONCLUSION

For all the foregoing reasons, the Board should issue the order requested by Intervenors herein.

Dated this 1<sup>st</sup> day of June, 2009.

Respectfully submitted,

**- electronically signed by**

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CERTIFICATE OF SERVICE

I hereby certify that copies "INTERVENORS' MOTION AND APPLICATION FOR STAY PENDING APPEAL" in the above captioned proceeding has been served on the following persons by electronic mail; on this 1<sup>st</sup> day of June, 2009:

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Dated: June 1, 2009

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## Hearing Docket

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**Subject:** Transmitting Document in Docket No. 40-8943 - ASLBP No. 08-867-02-OLA-BD01  
**Attachments:** Intervenor's Motion to Stay (Renewal) 06012009 final.pdf; Crow Butte (Renewal) COS 06012009.pdf

Dear All,

Attached please find Intervenor's Motion to Stay pending appeal and related COS.

Sincerely,

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Received: from mail1.nrc.gov (148.184.176.41) by TWMS01.nrc.gov  
(148.184.200.145) with Microsoft SMTP Server id 8.1.358.0; Mon, 1 Jun 2009  
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Mon, 01 Jun 2009 20:24:58 -0700 (PDT)

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08-867-02-OLA-BD01

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