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

Before Administrative Judges:

Ann Marshall Young, Chair

Dr. Richard F. Cole

Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.
(Expansion License for In Situ Leach
Facility, Crawford, NE)

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

July 10, 2009

**INTERVENORS' MOTION AND APPLICATION FOR
STAY PENDING APPEAL IN RELATED LICENSE RENEWAL PROCEEDING**

Pursuant to 10 CFR §2.323(a), Intervenor file by this motion an application to stay this proceeding pending resolution of the appeal of the Oglala Sioux Tribe and the Intervenor from the Commission's ruling in CLI-09-12, concerning a license amendment for Crow Butte Resources, Inc. Intervenor intend to file an appeal of CLI-09-12 to the Federal Court of Appeals for the Eighth Circuit in which the appeal of CLI-09-09 is pending.

Intervenor hereby move that this Board issue an Order: (1) staying this proceeding until the appeals from CLI-09-09 (in the related Renewal case) and the appeal of CLI-09-12 are finally resolved; and (2) including such other Orders as the Board finds to be necessary or appropriate in the interests of justice and developing a sound record in this proceeding, as contemplated below.

DISCUSSION

1. Timeliness. Intervenor filed a Motion to Stay on June 1, 2009 which was denied by the Board by Order dated June 18, 2009.¹ The two bases for the denial were that the Nuclear Regulatory Commission had not yet ruled on the appeals from LBP-08-06 and LBP-09-01 and that the primary harm asserted in that motion did not constitute irreparable harm required. On June 25, 2009, the Commission issued CLI-09-12 which ruled on such appeals. As a result, the first basis for denial of the motion to stay was removed. This Board issued the Order dated July 1, 2009 which noticed a telephone conference with the parties on July 7, 2009, “to discuss the schedule for the remainder of this proceeding, in light of the Commission’s decision in CLI-09-12.”² In the July 1, 2009 Order, the Board stated that “[a]ll parties shall be prepared to address all scheduling issues related to this proceeding.” During the July 7, 2009 conference call, Intervenor’s counsel raised the issue of filing a Motion to Stay or a Motion for Reconsideration now that CLI-09-12 had been issued.³

Intervenor notes that should this Motion be treated as a Motion for Reconsideration, a 10 day time period would apply to file a Motion for Reconsideration and that time period would have expired on July 5, 2009. If this Motion is deemed to be a Motion for Reconsideration then Intervenor respectfully suggests that the issuance of the Board’s Order on July 1, 2009, which included an order for the parties to be ‘prepared to address all scheduling issues related to this proceeding’, should be deemed to have extended the time for filing from July 5, 2009 to July 10, 2009. There is no prejudice to

¹ Order dated June 18, 2009 at 2.

² Order dated July 1, 2009 at 1.

³ See Order dated July 8, 2009 at 1 (¶2).

the parties because as stated by counsels to both Applicant and the NRC Staff during the July 7, 2009 call, both Applicant and NRC Staff will respond to this Motion. Finally, should the foregoing determinations need to be made, the trust responsibility and the Canons of Construction invoked thereby require determinations be made in the light most favorable to the Indigenous Intervenors.

2. 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-09-12, especially denying the admissibility of Contention C (Cultural Resources), Contention E (Foreign Ownership) and the Arsenic related portions of Contention B.⁴

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-09-12 the parties will have to back-track to re-integrate contentions parallel to any 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.

In addition, if the operation were to continue in a way that impairs the rights of the Indigenous Intervenors under NAGPRA, under the trust responsibility and/or under the Ft. Laramie Treaties, such as by causing disturbance to the artifacts or pre-historic

⁴ Id. at 2.

camp before the same can be examined by duly authorized representatives of the Oglala Lakota people, there would be irreparable harm to the Indigenous Intervenors.

Finally, in the case of the Arsenic contention, if it is re-admitted after a time when a material witness such as Aloysius Weasel Bear may have become unavailable, there would be extreme prejudice and irreparable harm to the Intervenors as pertains to the Arsenic part of Contention B.

3. No Prejudice to Other Parties. The North Trend Expansion is proposed to occur years in the future to accommodate uranium demand that has not yet materialized as of this date. Crow Butte Resources, Inc. has no pressing need for its expansion license at this time and there is therefore no reason to rush this proceeding while the appeal of critical issues is pending. 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 of CLI-09-09 in the renewal and will likely file an appeal of CLI-09-12, and the undersigned has been informed that the Oglala Delegation of the Great Sioux Nation Treaty Council does not object to the stay.

4. 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. However, Intervenors do note that on the material and dispositive

issue of foreign ownership, the Commission found it possible to reverse the Board's legal analyses without so much as a citation to a legal case. Therefore, Intervenors are likely to prevail on the issue in the appeal that the Commission's decision was arbitrary and capricious.

5. 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) at an appropriate time in that proceeding once it is properly filed and docketed.

CONCLUSION

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

Dated this 10th day of July, 2009.

Respectfully submitted,

/s/ - 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 1st day of June, 2009:

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Hearing Docket

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Attachments: Intervenor Motion to Stay (Expansion) 07102009.pdf; Intervenor (Expansion) EIE conformed COS 07012009.pdf

Attached for filing in this matter are:

Intervenor Motion to Stay and related COS.

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