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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges: Peter B. Bloch, Presiding Officer
Richard F. Cole, Special Assistant

In the Matter of:)

) Docket No. 40-8681-MLA-4

INTERNATIONAL URANIUM)
(USA) CORPORATION)
(source material license amendment))

) August 6, 1998

**THE STATE OF UTAH'S MOTION FOR STAY, REQUEST FOR PRIOR
HEARING, AND REQUEST FOR TEMPORARY STAY**

Introduction

Pursuant to 10 C.F.R. §§ 2.1263 and 2.788, Petitioner, the State of Utah, requests a stay of the effectiveness of the Nuclear Regulatory Commission Staff's ("Staff's) issuance of an amendment to International Uranium (USA) Corporation's ("IUSA") Source Material License No. SUA-1358, thereby barring IUSA from receiving, processing, and disposing of uranium-bearing material from the Ashland 2 Formerly Utilized Sites Remedial Action Program ("Ashland 2") site near Tonawanda, New York, until the completion of a hearing upon this amendment. The State's request for an immediately temporary stay to be granted is to preserve the status quo. 10 C.F.R. § 2.788(f). This motion is supported by the affidavit of William J. Sinclair,

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attached hereto as Exhibit 1 and fully incorporated herewith (hereafter "Sinclair Aff.")¹

The State received actual notice of the NRC Staff's approval of IUSA's license amendment on June 23, 1998, and filed a Request for Hearing and Petition for Leave to Intervene on July 23, 1998, which contains the full procedural history of this matter. Not until July 28, 1998, did the Division of Radiation Control of the Utah Department of Environmental Quality receive a U.S. Army Corps of Engineers ("USACE") news release via facsimile transmission that USACE had begun to ship the Ashland 2 material to IUSA's mill on July 24, 1998, prior to any hearing on the matter. See Exhibit 2. Accordingly, the State of Utah now finds it necessary to file this Motion to Stay the effectiveness of IUSA's license amendment and preserve the status quo until the NRC has held a hearing to address the health and safety issues raised in the State's Petition to Intervene.

Argument

I. THE STATE OF UTAH IS ENTITLED TO A PRELICENSING HEARING

The NRC's regulations, the Atomic Energy Act (the "AEA") § 189(a), 42 U.S.C. § 2239(a),² and the due process clause of the U.S. Constitution entitle the State of Utah to a prelicensing hearing on the amendment, because the amendment poses

¹ Pursuant to 10 C.F.R. § 2.788(f), the State of Utah has made "all reasonable efforts to inform the other parties of the application" for temporary stay by serving this motion via fax and overnight delivery to IUSA's counsel as well as the NRC Staff.

² "In any proceeding under this Act, for the . . . amending of any license . . . the Commission *shall grant a hearing* upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A) (emphasis added).

significant hazards to the health, safety, and welfare of Utah's citizens, wildlife, environment, and natural resources. Although a preclicensing hearing on the amendment is not necessarily required, the Commission has recognized that the particular circumstances of a case may entitle interested persons to a preclicensing hearing. Notice of Proposed Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 52 Fed. Reg. 20089, 20090 (May 29, 1987). See also Notice of Final Rule, Informal Hearing Procedures for Materials Licensing Adjudications, 54 Fed. Reg. 8269, 8273 (Feb. 28, 1989) (the Staff may take action despite a pending hearing request if it "is able to *reach a positive conclusion about the safety and environmental consequences* of the proposed licensing request."). In this case, the amendment poses a significant threat to health and safety, and the resources of the State of Utah, as discussed below. Moreover, shipment and processing of the wastes cannot be reversed in the event that the State prevails in the hearing. Sinclair Aff, ¶ 13. Consequently, a preclicensing hearing is required in this case.

II THE NRC SHOULD STAY THE EFFECTIVENESS OF IUSA'S LICENSE AMENDMENT

The four factors governing the issuance of a stay under 10 C.F.R. §§ 1263 and 2.788 dictate the issuance of a stay here.

A. The State of Utah Will Prevail on the Merits

The NRC Staff erred in granting the amendment to IUSA's Source Material License. The State of Utah has a strong likelihood of prevailing on its claims.

First, the NRC failed to establish that IUSA plans to process the Ashland 2 material primarily for its source material content because IUSA never satisfied the co-disposal test or the licensee certification and justification test. Under the co-disposal test, the NRC approves feed material for disposal in a tailings impoundment if the material would be approved under the "Final Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments." 60 Fed. Reg. 49,296, 49297 (1995). The amendment simply states, without any justification, that the Ashland 2 material meets this test. The NRC must actually apply the test and demonstrate that it is met *prior* to any license amendment. Moreover, the material clearly fails to satisfy the requirement that "[r]adioactive material not regulated under the AEA shall not be authorized for disposal in an 11e.(2) byproduct material impoundment." 60 Fed. Reg. 49,296 (1995). See Letter from Holonich to Rehmann of 6/23/98 ("[T]his material is *not* subject to NRC regulation until it is received by IUSA.") (emphasis added).

Also, the NRC did not appropriately apply the licensee certification and justification test. IUSA simply signed an affirmation that the uranium-bearing material is being processed primarily for the recovery of uranium and for no other purpose without any justification for such a certification. The material may contain very little recoverable uranium, making source material retrieval a financial disincentive. Sinclair Aff. ¶ 7. In all, neither the co-disposal test nor the licensee certification and

justification test has been met, and IUSA has not shown that it is processing the Ashland 2 material primarily for its source-material content.

Second, the amendment fails because Utah can show that the Ashland 2 material may contain hazardous waste. Under the NRC's staff guidance "Final Position on the Use of Uranium Mill Feed Material Other Than Natural Ores," 60 Fed. Reg. 49,296 (1995), the NRC cannot allow the receipt and processing of material other than natural uranium ores when the feed material contains hazardous waste. To date, the NRC has failed to establish that the Ashland 2 material is free of hazardous constituents.³ Instead, the NRC issued and effected IUSA's license amendment with a requirement for post excavation testing for hazardous waste. Sinclair Aff. ¶¶ 8-9. This amendment is inadequate and in direct violation of the NRC's guidelines -- the NRC cannot approve a license amendment for receipt and processing of material other than natural ores that may contain hazardous constituents. The determination must be made before the NRC approves the amendment.

In sum, Utah will undoubtedly prevail on the merits in this case because the NRC made errors in issuing IUSA's license amendment. Accordingly, the Presiding Officer should grant this Motion to Stay and prevent IUSA from receiving, processing, or disposing of the Ashland 2 material until completion of a hearing on this matter.

³ See In the Matter of International Uranium (USA) Corp., (White Mesa Uranium Mill; Alternate Feed Material), LBP 97-12, 46 NRC 1 (1997) (impossible for Hearing Officer to ascertain the basis for the Staff determination that alternate feed material is not hazardous).

B. IUSA's License Amendment Will Irreparably Harm the State of Utah Unless the Presiding Officer Grants This Motion to Stay

The State of Utah will suffer *immediate irreparable injury* if the Presiding Officer fails to grant this Motion to Stay because the USACE has already begun to excavate and ship the Ashland 2 material, before any hearing has occurred. Thus, if the amendment remains in effect, IUSA will receive at least some of the Ashland 2 material, threatening Utah's abilities to ensure protection of its citizens, environment, and natural resources.

First, if IUSA receives the Ashland 2 wastes prior to a hearing, it will avoid the stricter regulations for disposal facilities in Utah, thereby destroying Utah's abilities to protect its environment and citizens. IUSA will bypass the requirements of Utah Admin. Code R313-25 (equivalent to 10 CFR Part 61) and Utah Code Ann. § 19-3-105, which requires approval of a siting application and licensing application as well as local, legislative, and gubernatorial approval before storage or disposal of radioactive material.

Second, IUSA will receive and store material at a facility that has not demonstrated groundwater protection. The State of Utah required an NRC-licensed 11e.(2) disposal facility to apply for and receive a State of Utah Ground Water Discharge Permit. IUSA has no such permit. Sinclair Aff. ¶ 10. Additionally, IUSA currently monitors for only four parameters in the groundwater, a completely insufficient requirement for alternate feed materials that may contain numerous

additional constituents, including hazardous wastes. *Id.* ¶¶ 11-12. Thus, the amendment will allow IUSA to receive the Ashland 2 material and immediately pose a threat to Utah's environment and groundwater. Moreover, the amendment failed to address where the material would be stored and did not identify how groundwater will be protected at any storage location pending reprocessing. *Id.* ¶ 13.

Furthermore, IUSA could receive hazardous waste if the amendment remains in effect. IUSA's license amendment inconclusively demonstrated that the material was free of hazardous constituents. In fact, NRC's amendment required *post*-excavation testing, some of which would take place *upon arrival* at IUSA's facility. These conditions are even more inadequate when coupled with the evidence that the Ashland 2 area may have been used as a disposal for oil refinery residues, some of which are "listed hazardous waste" under 40 C.F.R. Part 261. *Sinclair Aff.* ¶¶ 8-9. Moreover, the amendment failed to address where the material would be stored or returned if hazardous constituents were found upon arrival at IUSA. *Id.* ¶ 13. In all likelihood, the material would remain at IUSA pending resolution. This option is unacceptable to Utah because it blatantly disregards Utah's role as protector of its environment and natural resources. The material should be verified *free* of hazardous waste before allowing any amendment to IUSA's license. Anything less will irreparably injure the State and will result in potentially hazardous waste being stored

and released in Utah, with future land and groundwater contamination possible.⁴

In all, if a stay is not granted, Utah will suffer immediate, irreparable, concrete injuries to its citizens, environment, and natural resources. Furthermore, allowing shipments to go forward will make it be impossible to preserve the status quo

C. The Harm to Utah Clearly Outweighs the Harm to Any Other Party in This Action

A stay pending completion of this adjudication would cause no undue harm to IUSA or the NRC Staff. First, IUSA will not suffer economic loss by waiting for this matter to be adjudicated. The Ashland 2 material has only small amounts of source material and the cost of processing 25,000 tons of feed material containing less than 1% uranium pales in comparison to any monies IUSA would receive from the sale of yellowcake processed from this transaction. Thus, IUSA will not be financially disadvantaged if a stay issues. Furthermore, any recoverable uranium from the Ashland 2 material would represent only a small fraction of IUSA's maximum annual yellowcake production,⁵ barely affecting its potential annual output. Moreover, there is no harm in leaving the waste in its current location, pending resolution of this proceeding. On the contrary, if the State prevails, any wastes shipped to Utah

⁴ Neither the impoundment nor any storage facilities have received regulatory review to ensure containment of the waste; thus, hazardous constituents could potentially contaminate the groundwater and environment. Sinclair Aff. ¶ 10.

⁵ IUSA's license limits its yellowcake production to 4380 tons per year. As stated in the NRC's TER, the Ashland 2 material contains a maximum of 1% uranium in the approximately 25,000 tons of material. Thus, a maximum of 250 tons of uranium could be recovered – only 5.7% of IUSA's annual limit.

potentially will need to find another location, thereby posing unnecessary risks. Thus, issuance of this stay will have little effect upon IUSA. In contrast, the storage and disposal of the wastes at White Mesa presents a threat to Utah's citizens and natural resources as has been outlined. Furthermore, if the wastes are shipped and Utah prevails, it may no longer be possible to ship the wastes back to the place of origin. Accordingly, Utah's Motion to Stay should be granted.

D. Public Interest Undoubtedly Supports the Issuance of a Stay

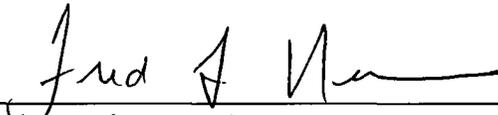
The public's interest unquestionably lies in granting the stay. At issue is the protection of the health and safety of Utah's citizens, who live, work, or travel near IUSA's facility and who use the land and water affected by IUSA's milling processes. The public interest certainly supports protecting the integrity of Utah's natural resources from any releases from the Ashland 2 material at IUSA's site. Finally, this stay will serve public interest by ensuring that Utah retains its right to a prior hearing. If the amendment is allowed to remain in effect, Utah will suffer irreversible injuries, making a mockery of the NRC's regulations and hearings.

Conclusion

For the foregoing reasons, the State of Utah requests (1) a stay of the effectiveness of IUSA's license amendment pending completion of a hearing on this matter and (2) an immediate, temporary stay before any answer is filed pending a decision on this motion.

DATED this 6th day of August, 1998.

Respectfully submitted,



Fred G Nelson, Assistant Attorney General
Denise Chancellor, Assistant Attorney General
Attorney for State of Utah
Utah Attorney General's Office
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USNRC

CERTIFICATE OF SERVICE

I hereby certify that copies of THE STATE OF UTAH'S MOTION FOR ⁹⁸AUG -7 P1:56
STAY, REQUEST FOR PRIOR HEARING, AND REQUEST FOR OFFICE OF SECRETARY
TEMPORARY STAY were served on the persons listed below by fax and Express RULEMAKINGS AND
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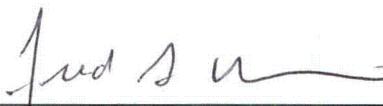
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| Joseph Holonich | NRC | 301-485-7238 | 301-415-5397 |
| Mr. John C. Hoyle, Office of the Secretary | NRC | 301-415-1969 | 301-415-1672 |
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EXHIBIT 1

**Affidavit of William J. Sinclair,
dated August 6, 1998**

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges: Peter B. Bloch, Presiding Officer
Richard F. Cole, Special Assistant

| | | |
|-------------------------------------|---|--------------------------|
| In the Matter of: |) | Docket No. 40-8681-MLA-4 |
| |) | |
| INTERNATIONAL URANIUM |) | |
| (USA) CORPORATION |) | |
| (Source Material License Amendment) |) | August 6, 1998 |

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

AFFIDAVIT OF WILLIAM J. SINCLAIR

I, WILLIAM J. SINCLAIR, being first duly sworn upon oath, depose and state as follows:

1. I am the Director of the Division of Radiation Control (Division or DRC), Utah Department of Environmental Quality (DEQ), having been appointed to that position on June 1, 1993, by the Executive Director of DEQ pursuant to Utah Code Ann. § 19-1-202.

2. I am also the Executive Secretary of the Radiation Control Board (Board), having been appointed to that position on June 1, 1993 pursuant to Utah

Code Ann. § 19-3-108(1). The powers and duties of the Executive Secretary are described in Utah Code Ann. § 19-3-108.

3. The Division of Radiation Control is under my immediate direction and control. See Utah Code Ann. § 19-1-105. As director, I administer the State of Utah's radiation control program which includes the following responsibilities:

- (a) registration and inspection of x-ray machines,
- (b) licensing and inspection of radioactive materials through Agreement State Status with the Nuclear Regulatory Commission,
- (c) licensing and inspection of low-level radioactive waste facilities through Agreement State Status with the Nuclear Regulatory Commission,
- (d) environmental monitoring activities,
- (e) emergency response to radiological incidents,
- (f) radon information dissemination, measurement and mitigation,
- (g) inspection of mammography facilities through contract with the United States Food and Drug Administration,
- (h) inspection of x-ray facilities of Utah hospitals through contract with Utah Department of Health, and
- (i) coordination of uranium mill issues with the Nuclear Regulatory Commission.

4. I earned a Master of Science degree in Environmental Health from East

Tennessee State University in 1980, and completed the Nuclear Regulatory Commission's (NRC) Applied Health Physics Course, Oak Ridge, Tennessee in 1994, and the NRC Transportation Course, Columbia, South Carolina in 1995.

5. In addition to my other responsibilities, I also hold the following positions:

(a) Governor's Designee as the party state representative and voting member of the Northwest Interstate Compact on Low-Level Radioactive Waste Management;

(b) NRC State Liaison Officer June 1993 to the present;

(c) Governor's Designee for Spent Fuel Shipment Notification from June 1993 to the present;

(d) Member, Organization of Agreement States (OAS) and OAS representative on the OAS/NRC Training Task Force;

(e) Utah representative, Organization of Agreement States; and

(f) Voting member, Conference of Radiation Control Program Directors.

6. I am familiar with the fact that IUSA operates uranium mining and processing facilities in the western United States, including the White Mesa Mill (the "Mill") near Blanding, Utah. The Mill processes conventional uranium ores and other types of ores with an acid leaching system and then disposes of the 11e.(2) byproduct

material in its tailings impoundment. In addition, the mill has a co-product recovery circuit for vanadium. The NRC regulates the Mill under Source Material License No. SUA-1358, granted following the Mill's construction in 1980. The license was renewed in 1997. The license covers receipt and processing of uranium ores, limiting the total production of U_3O_8 to 4380 tons per year, and regulates the disposal and reclamation of the uranium byproduct materials in accordance with 10 CFR Part 40, Appendix A.

7. I am aware that on June 23, 1998 NRC issued an amendment to the Mill's license which allows IUSA to receive and process uranium-bearing materials from the Ashland 2 FUSRAP site, which is currently under the management of the U.S. Army Corps of Engineers. IUSA plans to receive and process approximately 24,000 to 25,000 dry tons of material from the Ashland 2 site. The uranium content of these materials has been difficult to estimate, however, IUSA admits that the content probably ranges from nondetectable to approximately 1.0 percent. I am also aware that while the NRC claims the material may meet the definition of the Atomic Energy Act's 11e.(2) byproduct material, it is not subject to NRC regulation until received by IUSA because it was produced by an activity not licensed by the NRC after November 8, 1978. Letter from Holonich to Rehmann on 6/23/98.

8. The hazardous waste content of the Ashland 2 material has not been adequately characterized. The amendment requires that "ICF Kaiser, the USACE contractor charged with excavating the material and preparing it for shipment offsite,

will conduct confirmatory testing of *excavated* materials prior to their shipment to ensure that listed hazardous wastes will not be included in shipments to White Mesa." Letter from Holonich to Rehmann of 6/23/98 (emphasis added). The amendment fails to address the nature and extent of this post-excavation testing, and more testing must be done *prior* to excavation to protect against dilution and mixing. Defined investigations and testing, *prior to excavation*, is necessary to ensure that the Ashland 2 material does not contain hazardous constituents.

9. The Remedial Investigation Report for the Tonawanda Site on page I-29 indicates the presence of BNAE compounds detected in samples including 2-methylnaphthalene, phenanthrene, fluoranthene, pyrene, benzo(a) anthracene, bis (s-ethylhexy) phthalate, chrysene, and benzo (a) pyrene and suggests that the area may have been used for disposal of oil refinery residues. Several oil refinery residues are "listed hazardous waste" under 40 CFR Part 261. The NRC evaluation in relation to hazardous waste determination is, therefore, not adequate.

10. Neither the impoundment nor any storage facilities has received regulatory review to insure that either are capable of containment of the waste and are constructed to protect groundwater and other State resources. No State groundwater discharge permit has been issued as required under Utah law. A state groundwater discharge permit is pending and requires the use of best available technology (BAT) in design of tailings impoundments. Because the existing tailings impoundment at the

White Mesa Mill was constructed in the late 1970's and may not meet current BAT design specifications, there is a significant potential for release of hazardous constituent from this impoundment.

11. The State of Utah developed a list of 28 non-radiological parameters based on an NRC report which surveyed Title II mills and their tailings contents. Typically, nickel, molybdenum, and beryllium were metals identified as being associated with uranium ores. Consequently, TOC and TOX were added to the Utah list as an additional scan for other parameters. Also, organics are typically found in tailings, and those associated with tailings operations were added to the Utah list. Experience with regulating the groundwater at another NRC licensed 11e.(2) facility in Utah has illustrated an ongoing need to be familiar with the wastes being received as 11e(2) materials. The wastes being received at the other NRC licensed facility are variable, and a recent DRC staff report recommended the monitoring program should include such parameters as pesticides, PCBs, and semi-volatile compounds like anthracene and chrysene as a result of the addition of "new" 11e.(2) waste streams.

12. Currently, IUSA's Source Material License requires monitoring for only four parameters in the groundwater. This is an inadequate requirement even for a uranium mill processing ore, and as alternate feed materials become a common element of the mill operation, undetected releases of a radiological or non-radiological constituents could occur due to the limited monitoring and because of the potential for

many additional constituents to be received in alternate feed as compared to conventional ores. A properly licensed Part 61 low level radioactive waste disposal facility represents a safer and more strictly regulated facility than a tailings impoundment. Thus, IUSA will bypass the stricter requirements of R313-25 (equivalent to 10 CFR Part 61), disposing of the material in a less regulated, less safe facility and threatening to harm Utah's environment, natural resources, and citizens. This is a dangerous precedent that could lead to massive amounts of similar material being "processed" at the Mill rather than being disposed of in a properly licensed and safer low level waste disposal facility.

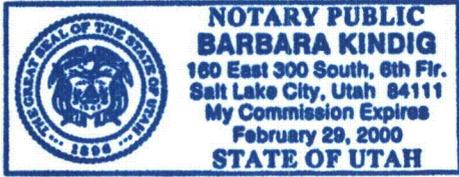
13. Allowing receipt of the Ashland 2 wastes at White Mesa, prior to a decision on the State's petition, would result in, potentially, no facility being able to receive and dispose of the waste. At that point in time, it may not be appropriate or possible to return the wastes to the Ashland site. There is no contingency in the license of an alternative course of action should the State prevail in its challenge to the license amendment.

FURTHER AFFIANT SAYETH NOT.

DATED this 6th day of August, 1998.


WILLIAM J. SINCLAIR

Voluntarily signed and sworn to before me this 6th day of August, 1998, by the signer, whose identity is personally known to me or was proven to me on satisfactory evidence.



Barbara Kindig
NOTARY PUBLIC

Residing at: Salt Lake Co.
My Commission expires: _____

EXHIBIT 2

Material Being Shipped from FUSRAP Ashland 2 Site

<http://www.nec.usace.army.mil/pr/news/7-27-98.htm>



US Army Corps
of Engineers
Buffalo District

News Release

FORMERLY UTILIZED SITES REMEDIAL ACTION PROGRAM

Release #9838 Arleen K. Krensch
July 27, 1998 716-879-4438

Material Being Shipped from FUSRAP Ashland 2 Site

TONAWANDA - The first flatbed railcar carrying four intermodal containers loaded with soil containing low levels of radioactive material left the Formerly Utilized Sites Remedial Action Program Ashland 2 Site on Friday, July 24.

The intermodals each holding approximately 20 tons of material are headed for International Uranium Corporation's White Mesa Mill near Blanding, Utah, 282 miles southeast of Salt Lake City. The material will be transported in accordance with Department of Transportation regulations and will take approximately 10 days to reach its destination. Excavation and shipment of material will continue through September 1998 with three or four flatbed railcars leaving the site each weekday.

The U. S. Army Corps of Engineers-Buffalo District will hold an Informal Information Session Wednesday, August 5 from 7 to 9 p.m. at the Phillip Sheridan Building, Room 122, 3200 Elmwood Avenue, Kenmore, to provide information and answer questions in regard to the remedial action at this site.

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