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

In the Matter of	)	Docket No. 40-8943
	)	ASLBP No. 08-867-02-0LA-BD01
CROW BUTTE RESOURCES INC.	)	
	)	
(License Renewal for the In Situ Leach Facility, Crawford, Nebraska)	)	November 11, 2014

APPLICATION THE OGLALA SIOUX TRIBED FOR A STAY OF THE ISSUANCE OF LICENSE NO. SUA-1534 UNDER 10 CFR SECTION 2.1213

Pursuant to 10 CFR 2.1213, the Oglala Sioux Tribe hereby submits this Application for a Stay of the issuance of Source Materials License SUA-1600 (the "License") which was issued to Crow Butte Resources, Inc. ("Applicant"), and noticed to the parties by the NRC Staff on November 6, 2014 ("the Notice").[1] This motion is timely filed in accordance with Section 2.1213(a).

I. The NRC Staff Notice Was Premature and a Breach of Trust Obligations

The Oglala Sioux Tribe joins in the arguments and authorities set forth in the application for stay filed concurrent herewith by the Consolidated Intervenors. On October 27, 2014, the Tribe appointed Andrew Reid as their counsel in this matter. Mr. Reid formally appeared in this matter as the Tribe's counsel two days ago, on November 12, 2014. Initially, the Tribe was represented in this matter by in-house counsel. On September 8, 2009, attorney Grace Dugan appeared as counsel for the Tribe but then withdrew about a month later. After centuries of occupation and oppression by the United States, the Pine Ridge Indian Reservation, the home of the Oglala Sioux Tribe, has been widely described as the "poorest place in the United States." It

[1] As required by 10 CFR § 2.323(b), counsel for the Oglala Sioux Tribe consulted with counsels

has an unemployment rate of 80-90% and a per capita income of less than $4,000. Life expectancy on Pine Ridge is the lowest in the United States and the second lowest in the Western Hemisphere. The Reservation has some of the highest rates of alcoholism, heart disease, and cancer in the United States[2].

Conducting litigation of this nature to protect the interests of the Tribe and its people, including the payment of attorney fees, places a highly inordinate burden on the Tribe. As a result, the Tribe has been in essence without counsel in this and the related Crow Butte NRC matters for over a year. The Tribe was only able to obtain counsel when Mr. Reid agreed to represent the Tribe pro bono from Denver, Colorado, through his affiliation with the Ved Nanda Center of International and Comparative Law at the University of Denver's Sturm College of Law.

The Tribe asserts that the NRC Staff's Notice of License Issuance was premature and defective because: (1) the NRC Staff lacked authority and jurisdiction to issue the License in that the federal government lacks lawful jurisdiction over the rights and interests of the Oglala Sioux Tribe, a sovereign indigenous nation, its people, its lands, and its natural resources[3], (2) the License was issued before a hearing on the admitted contentions has even been scheduled thereby depriving the Oglala Sioux Tribe and its people of an opportunity to be heard and continuing the violations of their treaty rights and territorial integrity, their collective spiritual and cultural rights and their human rights to self-determination, property, due process, equal

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[2] Testimony of John Yellow Bird Steele, President of the Oglala Sioux Tribe Oversight Hearing on Indian Housing Before The Senate Committee on Indian Affairs (March 22, 2007), http://www.indian.senate.gov/sites/default/files/upload/files/Steele032207.pdf.

[3] The Oglala Sioux Tribe participates in this proceeding subject to its continuing objection to the jurisdiction and authority of the federal government over it and the people, lands, and natural resources of the Tribe.

protection, and adequate remedy under binding international law,[4] as well as violating the trust duty/responsibility doctrine assumed by the federal government to the Tribe; (3) the license was knowingly issued by the NRC Staff at a time when the Oglala Sioux Tribe and its people due to their limited resources were not and had not been represented by counsel in this matter for an extended length of time further breaching the federal government's assumed trust responsibility and its aforesaid obligations under international law.

II. Application for a Stay.

[4] Those international laws, signed, ratified, and thereby adopted as domestic law by the United States include but are not limited to the Charter of the United Nations (1945), Universal Declaration of Human Rights ("UDHR") (1948), the International Convention on the Elimination of All Forms of Racial Discrimination ("ICEAFRD") (1965), the International Convention on Civil and Political Rights ("ICPCR") (1966), the United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP") (2007), the Charter of the Organization of American States ("OAS") (1948), and the American Declaration of the Rights and Duties of Man (1948). The Tribe reserves the opportunity and right to expound upon these jurisdictional and collective human rights law and arguments.

See also, *e.g.*, UN Special Rapporteur Tonya Gonnella Frichner, "Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights," United Nations Economic and Social Council (E/C 19/2010/13) (February 3, 2010) (http://www.un.org/esa/socdev/unpfii/documents/E%20C.19%202010%2013.DOC); Advisory Opinion on Western Sahara (62) (International Court of Justice) (1975) ("the concept of terra nullius, employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, stands condemned." (J. Ammoun at p. 86)); *Mabo v. State of Queensland* [No. 2], 175 CLR 1 (1992) (http://www.7genfund.org/sites/default/files/helpful-resources/Mabo%20v%20Queensland%20(No%202)%20(%2522Mabo%20case%2522)%20%5B1992%5D%20HCA%2023.pdf) (condemning and rejecting "discovery" as a concept of modern international law); *Mary and Carrie Dann v. United States*, IACHR Report No. 75/02, Case 11.140 (December 27, 2002) (holding that federal Indian law violates the human rights of indigenous peoples by failing or provide them an effective remedy for wrongful occupation and taking by the United States of indigenous lands and natural resources); *Western Shoshone Indigenous Peoples Decision 1(68)*, Early Warning and Urgent Action Procedure, United Nations Committee for the Elimination of Racial Discrimination (February 20 – March 10, 2006) (same); *Maya Indigenous Communities of the Toledo District v. Belize*, IACHR Report No. 40/04, Case 12.053 (October 12, 2004).

A. Summary of Action To Be Stayed. The issuance of the License by the NRC Staff should be stayed at a minimum until after the Board has set and conducted the hearing in this proceeding, heard the evidence presented and had an opportunity to question the experts presented and rendered a final, appealable decision that is subject to being stayed by the Commission under Section 2.342, or by a federal court or international tribunal having jurisdiction, if applicable.

B. Statement of Grounds for Stay.

1. Applicable Legal Standards. Under domestic law binding upon the NRC and its Staff, in determining whether to grant or deny an application for a stay of the NRC staff's action, the four (4) standard stay factors must be considered as described in Section 2.1213(d). The Commission stated that "when evaluating a motion for a stay we place the greatest weight on…irreparable injury to the moving party unless a stay is granted. *ShieldAlloy Mettalurgical Corp.* (Newfield New Jersey Site), CLI 10-08, slip. op. at 12 (2010) citing *David Geisen,* CLI-09-23, 70 NRC __ (Nov. 17, 2009)(slip op. at 2)(citing *Entergy Nuclear Vermont Yankee, LLC* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)); *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). Further, requestor must make a showing of a "threat of immediate and irreparable harm" that will result absent a stay. *Shieldalloy Metallurgical Corp.* (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC (slip. op. at 12) (2010)*; AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008). Specifically, [a] party seeking a stay must show it faces imminent, irreparable harm that is both **certain and great**." *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4) CLI 12-11 (2012) – 75 NRC __ (slip. op. at 7); *Entergy Nuclear Vermont Yankee, LLC (*Vermont Yankee

Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (emphasis added). This is consistent with the federal law generally, as "requests for preliminary injunction are analyzed under the four factors set forth in *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir.1981).

To qualify as irreparable harm justifying a stay, the asserted harm must be related to the underlying claim. *Southern Nuclear Operating Co.*, slip. op. at 9 citing *United States v. Green Acres Enter, Inc*., 86 F.3d 130, 133 (8th Cir. 1996). See also *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 733 (8th Cir. 1986) (injury that had never been the focus of the lawsuit was insufficient to find irreparable harm). Unlike *Southern Nuclear Operating Co.*, where there was only one contention admitted and it was not related to the asserted harm in the stay motion, in this case, this application is directly related to the lawful authority and subject matter jurisdiction of the NRC and the Tribe's admitted Contentions A (health impacts), C (surface water impacts from accidents), and D (communication of contaminants to other aquifers), as well as to other amended and / or new contentions that may be further stated pursuant to the Board's Order of October 38, 2014.

The Supreme Court has recognized that the United States has "moral obligations of the highest responsibility and trust" to Native nations and peoples whose territory and affairs it has occupied, unlawfully, and must use "great care" in its dealings with them. *See*, *Seminole Nation v. U.S.*, 316 US 286 (1942); *U.S. v. Mason*, 412 US 391, 398 (1973). Certainly there is an abject failure in the exercise of that responsibility when the NRC Staff proceeds upon a license application and makes a decision thereon adverse to the substantive rights and interests of the Tribe and its people at a time when the NRC Staff is aware the Tribe and its people no longer have effective representation. Proceeding under these circumstances renders the NRC Staff's

decision to issue the License a sham in the nature of that committed by the federal government when it attempted to steal Sioux territory and lands through the Treaty of 1877, 19 Stat. 254 (February 28, 1877), under sham assertions that the Sioux people were properly represented in that matter. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

Under federal law binding upon the NRC and its staff, Native nations have substantial rights, including the right to meaningful consultation. "*Government-to-Government Relations with Native American Tribal Governments*", 59 Fed. Reg. 22951, 1994 WL 16189198 (April 24, 1994) and Executive Order No. 13175, *Consultation and Coordination With Indian Tribal Governments*, 65 FR 67249, 2000 WL 1675460 (Executive Order, Nov. 06, 2000); *see also*, "Tribal Consultation Policy Statement and Protocol" US NRC (August 27, 2014) (Doc. ML14240A38). "The unique trust relationship between the federal government and Native Americans" requires that "if an ambiguity in a statute (or, by extension, regulation or agency action) "can reasonably be construed as the Tribe would have it construed, it must be construed that way." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997), quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988), *cert. den.,* 488 U.S. 1010 (1989); see also *Oneida County, NY v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985); *US v. Washington*, 157 F.3d 630, 643 (9th Cir. 1998), *cert. den.*, 526 U.S. 1060 (1999); *McNabb for McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987). All rights held by a tribe extend also to its tribal members, as a result, either a tribe or an individual tribal member, or both, may file suit to enforce a tribe's rights. See *Puyallup Tribe, Inc. v. Dept. of Game*, 433 US 165 (1977) (suit by tribe); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or. 1969) (suit by tribal members).

Under international law, the Oglala Sioux Tribe and other indigenous peoples possess a right not just to be consulted in a meaningful manner, but a right of informed, prior "**consent**". UN DRIP, article 11, sec. 2; article 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." (2007); article 32, sec. 2 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.").

2a. **Irreparable Harm.** The License issuance puts spiritual, cultural, and natural resources of the Tribe and the health of its people at risk of further destruction by Licensee's continuing operation and construction activities that may continuing contamination of the ground and surface water resources through spills, leaks and excursions from the facility, and the continuing theft and conversion of the lands and natural resources of the Tribe for the private gain of Applicant Crow Butte Resources, Inc.

Furthermore, each violation of the federal government's obligations to the Tribe under international law, each violation of the federal government's trust responsibility and of the NRC's duty to provide meaningful consultation, and each of the issues complained about by the Tribe constitutes an additional incident of irreparable harm and impairs the nation-to-nation relationship between the Oglala Sioux Tribe and the United States.

2b. Likelihood of Prevailing on the Merits. Consolidated Intervenors and the Tribe have provided a showing that there is reason to believe there are spiritual, cultural, and natural resources in the Project Area that have not been adequately investigated, evaluated, and made the subject of effective measures and plans and that there are pathways of contamination from the existing facility site to the treaty and aboriginal lands of the Oglala Sioux Tribe and the Pine Ridge Indian Reservation

2c. Harm to Other Participants. Licensee has continued to operate its facility without interruption, and without the renewal of its license, following the expiration of its license. Accordingly, there is no harm to Applicant Crow Butte Resources, Inc. from waiting until a final decision after the evidentiary hearing and argument on the contentions before a decision is made on the renewal of its license. Even if it asserts any economic damages from the delay caused by the stay, such purported damages would not be sufficient or relevant after a showing of irreparable harm has been made. See *Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980).

2d. Public Interest Favors Granting the Stay to Preserve Status Quo. It is clear that the public interest is served by preserving the status quo until the contentions of the Tribe and the Consolidated Intervenors can be properly and fairly heard and decided on the merits. It affirms due process of law and avoids unnecessary, rash, arbitrary, and unreasonable decisions by the agency. A stay would further affirm and respect, in part, the federal government's trust obligations to the Tribe.

For all the foregoing reasons, the Board should stay the issuance of the License as described in Section II.A above.

Respectfully Submitted,

Signed (electronically) by Andrew B. Reid

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Dated: February 14, 2014, Denver, Colorado.

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the APPLICATION THE OGLALA SIOUX TRIBED FOR A STAY OF THE ISSUANCE OF LICENSE NO. SUA-1534 UNDER 10 CFR SECTION 2.121 were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: February 14, 2014.

Signed (electronically) by Andrew B. Reid

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