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P R O C E E D I N G S

11:04 a.m.

1
2
3 ADMIN. JUDGE GIBSON: Thank you, this is
4 Judge Gibson. Let me first introduce the Board that
5 is on this call.

6 Dr. Wardwell is on the call. He has
7 replaced Dr. Cole. Some of you may have recalled Dr.
8 Cole from our original hearing in 2008. Sadly, Dr.
9 Cole died recently and in fact we attended his funeral
10 yesterday. So we have a new Board member, Dr.
11 Wardwell.

12 Also on the call is Brian Hajek as well as
13 our Special Assistant to the Board, Alan Rosenthal,
14 Judge Rosenthal. And along with us here is Nick
15 Sciretta who is the law clerk on this case and with
16 whom I believe all of you have had at least some
17 communication.

18 With that I would like to have
19 announcements of counsel and the party each
20 represents. Beginning first with the Applicant.

21 MR. SMITH: This is Tyson Smith on behalf
22 of the Applicant, Crow Butte Resources.

23 MR. MCGUIRE: This is Mark McGuire on
24 behalf of Crow Butte Resources.

25 ADMIN. JUDGE GIBSON: Okay. NRC staff?

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1 MR. CYLKOWSKI: Good morning, this is
2 David Cylkowski on behalf of the NRC staff. And
3 Marcia Simon is on the phone as well.

4 ADMIN. JUDGE GIBSON: Thank you. And for
5 the Intervenors, we have, I believe at least three
6 counsel. You can introduce them in whatever order you
7 want. Just don't talk at the same time.

8 MR. BALLANCO: Good morning Your Honor,
9 this is Tom Ballanco for Tom and Loretta Cook and Joe
10 American Horse.

11 MR. ELLISON: Bruce Ellison, Consolidated
12 Intervenors.

13 ADMIN. JUDGE GIBSON: And for the Tribe?

14 MR. REID: Yes, Andrew Reid for the Oglala
15 Sioux Tribe.

16 MR. FRANKEL: And David Frankel for
17 Consolidated Intervenors.

18 ADMIN. JUDGE GIBSON: Okay. Very well.
19 Thank you. Our Court Reporter is also on the phone
20 with us. Is that correct? Court Reporter?

21 COURT REPORTER: Yes, I'm here.

22 ADMIN. JUDGE GIBSON: Okay, good. I would
23 -- since we have a lot of parties here, even though I
24 know each of you probably has a unique voice
25 footprint, our Court Reporter is not going to be able

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1 to pick that up.

2 So I would ask that each of you please
3 state your name. He has the parties you represent.
4 But I would ask that each of you state your name
5 before you make whatever remarks you make.

6 We are -- we will shortly be holding oral
7 argument on Motions to Stay the Renewed License for
8 Crow Butte. Before doing so, it is my understanding
9 that the parties have been attempting to find an
10 acceptable date in the spring or summer when we might
11 be able to hold a hearing on any contentions that will
12 pass through the gauntlet that I'm sure they're going
13 to have to pass through in order to get admitted and
14 heard.

15 The dates that we have -- Mr. Sciretta has
16 been hard at work to try to come up with dates. And
17 the dates he's come up with are June 29 to July 1.
18 Now I'm not going to ask for an absolute commitment at
19 this time. But I would ask for you all to consult
20 with your clients. It is very hard to find one single
21 week when all of you can be in the same place at the
22 same time.

23 And it may create some inconvenience to
24 you. But I would ask -- encourage all of you to study
25 that date -- those dates. Make sure it will work for

1 you. And Mr. Sciretta will be in contact with you
2 between now and Christmas.

3 And I would like to have the dates set in
4 stone by then. Does everybody understand that?

5 MR. CYLKOWSKI: Yes sir.

6 MR. BALLANCO: Yes.

7 MR. MCGUIRE: Yes.

8 ADMIN. JUDGE GIBSON: Okay. Very well.
9 Here is how I would like to proceed on oral argument.
10 The Board has read the pleadings and I believe we
11 understand the parties basic positions. And so there
12 is no need for any opening statement from anyone.

13 The Board does however have a number of
14 questions that we would like to address to the parties
15 this morning. If after the Board concludes its
16 questions, you are absolutely convinced that we have
17 missed something critical, we will allow each side to
18 make a very brief closing. But I -- when I say brief,
19 I mean less than two minutes.

20 And I'm hoping we won't need to do that.
21 But I don't want anyone to walk out of here thinking
22 that we missed something that was very important.

23 Does everybody understand these ground
24 rules?

25 (Chorus of yeses)

1 ADMIN. JUDGE GIBSON: Good. Okay. Well,
2 it has been a long time since we have had -- last had
3 our opportunity to convene in this matter. And since
4 we have one new Board member and at least two new
5 counsel, I will briefly provide what I hope is the
6 requisite background for our oral argument today.

7 In October 2008, this Board held oral
8 argument on the admissibility of several contentions
9 that were proffered by various Intervenors here to
10 challenge the renewal of Crow Butte's in situ leach
11 mining operation near Chadron, Nebraska.

12 In conjunction with our evaluation of
13 these contentions, and in order better to manage this
14 proceeding, we ask the staff to provide us with a good
15 faith estimate of the time that would be required to
16 complete its safety evaluation report and its
17 environmental documents required under NEPA. Which in
18 this case is an environmental assessment.

19 The staff at that time estimated that it
20 would complete its safety evaluation report by the
21 fall of 2009. And would complete its environmental
22 assessment by December 2009.

23 Well, as it turned out, the staff's
24 estimates were a little optimistic. In fact, the
25 safety evaluation report was not issued until January

1 2, 2013, a little over three years later then
2 projected. And the environmental assessment was not
3 issued until October 27, 2014, nearly five years later
4 then projected.

5 Which means that this evidentiary
6 proceeding has been in suspense for over six years as
7 we awaited the issuance of the safety evaluation
8 report and the environmental assessment. Now, I must
9 say frankly that the Board had assumed that we would
10 have proceeded to hearing on the contentions or any
11 new ones that would arise from these fact documents
12 soon after those documents were issued.

13 And that after completion of the
14 evidentiary hearing, the license would either have
15 been renewed, would have been renewed with
16 modifications, or would not have been renewed at all.
17 But instead, as I understand it, on November 5 the NRC
18 staff renewed the license for Crow Butte despite this
19 pending evidentiary hearing.

20 Because the relief the Intervenors seek
21 here is the equitable remedy of a stay of the renewal
22 of the license, until the evidentiary hearing process
23 is complete, I would like to address my first question
24 to counsel for the NRC staff.

25 As Judges who will be ruling on this

1 equitable remedy, this Board must balance the
2 equities. And I think it is a fair statement that had
3 the Agency done nothing at all rather than reissuing
4 this -- renewing this license as it has for the last
5 six years, during the pendency of this evidentiary
6 hearing process, Crow Butte would have been allowed to
7 continue to conduct its in situ leach mining operation
8 under the terms of the prior license, just as it has
9 been doing for the last six years. Is that correct?

10 MR. CYLKOWSKI: Yes, Your Honor, that's
11 correct. This is David Cylkowski on behalf of the NRC
12 staff.

13 ADMIN. JUDGE GIBSON: Thank you. So the
14 Board is a bit mystified at the renewal before instead
15 of after the conclusion of the evidentiary hearing.
16 And we're wondering what is the big rush to issue a
17 renewed license before we have completed this
18 evidentiary hearing?

19 Isn't the practical effect no different in
20 allowing Crow Butte to continue to operate just as it
21 has for the last several years then in issuing the
22 renewed license?

23 MR. CYLKOWSKI: So Your Honor, first I'd
24 like to say that under 10 CFR 2.1202, the staff is
25 expected to, I quote, promptly issue a license, even

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1 during pendency of a hearing. And of course the Board
2 will still hold a full hearing on any admitted
3 contentions.

4 But second and importantly, you're correct
5 that because the authority under the old and the
6 renewed license are substantially the same, there
7 really isn't a practical effect to granting a stay
8 here. And that's actually a main reason why we
9 maintain that a stay is not appropriate in this case.

10 ADMIN. JUDGE GIBSON: Well, while we're
11 looking at equities, is there some irreparable injury
12 that the NRC staff would sustain if the license
13 renewal were to be stayed? You know, after the
14 evidentiary process has run its course?

15 MR. CYLKOWSKI: Your Honor, no. There's
16 no irreparable injury that the NRC staff would
17 sustain, precisely because there's no real practical
18 effect to issuing a stay.

19 However, it is -- the burden is on the
20 Intervenors who are asking for a stay, to demonstrate
21 that they will experience irreparable injury in the
22 absence of a stay. Not that -- the burden's not on
23 the staff or on the Applicant to show irreparable
24 injury if the stay is granted.

25 ADMIN. JUDGE GIBSON: So I appreciate what

1 you're saying that the rules were set up that way. I
2 also know that this is equitable relief that they're
3 seeking here. And I'm just -- we're trying to balance
4 the equities as we evaluate this.

5 And what I hear you saying is you would
6 not suffer any irreparable injury, but you're sort of
7 obligated to do this because 10 CFR 1202 refers to
8 promptly. Is that right?

9 MR. CYLKOWSKI: That's correct, Your
10 Honor. And I would add, I mean, when -- in balancing
11 the equities, I think redressability needs to be a
12 major consideration. Whether a stay would actually
13 redress the injuries that Intervenors are complaining
14 of.

15 And because that's not the case here, we
16 maintain it's difficult to balance the equities in
17 favor of granting a stay.

18 ADMIN. JUDGE GIBSON: Okay. Counsel for
19 the Applicant, I'm just curious, are you -- do you
20 have anything else to add here? Is there some
21 irreparable injury that you would see your client
22 would sustain if we waited until after the evidentiary
23 hearing process was complete?

24 MR. SMITH: Yes, Judge. I think while not
25 necessarily an irreparable injury, but there is harm

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1 to Crow Butte from a stay. One of which is that it
2 creates additional regulatory uncertainty regarding
3 the license and proposed other expansion areas.

4 COURT REPORTER: Could the current speaker
5 identify himself?

6 MR. SMITH: This is Tyson Smith for the
7 Applicant, Crow Butte.

8 ADMIN. JUDGE GIBSON: Thank you.

9 MR. SMITH: A stay could force Crow Butte
10 to incur additional costs to mitigate the uncertainty
11 associated with both the continued operation of the
12 main mining site. But also to other license
13 amendments for satellite facilities that are linked in
14 some degree to renewal of the operating license for
15 the main operating site.

16 ADMIN. JUDGE GIBSON: I believe Judge
17 Rosenthal --

18 ADMIN. JUDGE ROSENTHAL: Mr. Smith, this
19 is Judge Rosenthal. I don't understand that at all.
20 I mean the uncertainty.

21 I mean, you've been facing for six years
22 now as a result of what I characterize as staff
23 inaction, the possibility that this Board in
24 entertaining on the merits of the claims of the
25 Tribes, would find that actually that the operation of

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1 this mine was in fact having an adverse effect upon
2 the health and welfare of these Petitioners. So that
3 you've been in a state of suspension for six years and
4 this is because the Board hasn't had the opportunity
5 to conduct an evidentiary hearing.

6 And you're going to be, it seems to me, in
7 a state of uncertainty with regard to any license.
8 And the continued operation of this mine until such
9 time as this Board passes upon the contentions that
10 the mine is having again, an adverse impact upon the
11 Petitioners.

12 So I just don't understand your argument
13 at all. You're in a state where until this Board
14 rules on the operations of this mine, you will not
15 know what the future is for Crow Butte.

16 MR. SMITH: Well certainly that's true
17 ultimately. I think that the standard that applies to
18 a Stay Motion, one of the factors is of course whether
19 or not the other party is likely to succeed on the
20 merits.

21 So if the Board were to issue a stay that
22 would suggest to customers that there is the
23 probability of a greater than zero success on the
24 merits. That would be larger than I think if the stay
25 was not issued.

1 So I do believe it creates additional
2 uncertainty that's not necessary. And under the NRC's
3 rules, it's appropriate to issue the license once the
4 staff has completed their technical and safety
5 reviews. And I believe that's what they should do
6 here and what they properly did here.

7 And you know, it's incumbent upon the
8 Intervenors to demonstrate that they meet the
9 balancing of the factors for issuance of a stay. And
10 they certainly haven't met the irreparable harm or the
11 likely to succeed on the merits factors here.

12 ADMIN. JUDGE GIBSON: Counsel, it appears
13 to me that you've raised an excellent point. And that
14 is that it's rather ironic that by virtue of having
15 this license issued -- renewed before the hearing had
16 completed, doing anything to reverse it would create
17 more havoc for you than had the staff not issued
18 anything and waited until the hearing was complete.

19 I don't expect you to endorse that view.
20 But it is rather obvious I think.

21 Counsel for Consolidated Intervenors and
22 counsel for the Tribe, I have some questions for you
23 now. Setting aside the fact that it seems
24 counterintuitive to renew the license before the
25 evidentiary hearing is completed, we are not here to

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1 judge whether this is good policy.

2 Rather, what we're here to judge is
3 whether the equities favor your side or the side of
4 the NRC staff and Crow Butte. It is my understanding
5 that the grant of a stay is an extraordinary remedy
6 and a rare occurrence in NRC practice. You would not
7 dispute that, would any of you?

8 MR. FRANKEL: No.

9 MR. REID: No, Your Honor.

10 ADMIN. JUDGE GIBSON: I don't know who
11 spoke, but the Court Report can't just get a no. So
12 can you say who just agreed with me?

13 MR. FRANKEL: Apologies Your Honor --
14 apologies. David Frankel for Consolidated
15 Intervenors. Apologies to the Court Reporter. And
16 the answer is no, none of us would dispute Your
17 Honor's statement.

18 ADMIN. JUDGE GIBSON: Okay. Mr. Reid?

19 MR. REID: For the Oglala Sioux Tribe, I'm
20 unaware of other situations in which a license has
21 been issued before the evidentiary hearings have been
22 held. I think under those circumstances I don't think
23 this is unusual because I'm unaware of other precedent
24 that would state that this in fact is unusual.

25 ADMIN. JUDGE GIBSON: Before Mr. Ballanco,

1 before you answer, let me just ask the staff, I'm sure
2 you guys are -- I'm sure you guys have researched this
3 question. Can you give us the name of a specific
4 license that has been issued before the evidentiary
5 hearing has been completed so that -- and if so, so
6 that we'll all know that?

7 MR. CYLKOWSKI: Your Honor, as I sit here
8 off the top of my head, I cannot name another one.
9 I'm sorry, this is David Cylkowski on behalf of the
10 staff.

11 ADMIN. JUDGE GIBSON: Okay.

12 MR. CYLKOWSKI: But I can say it is
13 practice. It is in accordance with the regulations to
14 do so. And to not do so in a license of this type,
15 would be a departure from practice.

16 ADMIN. JUDGE GIBSON: How long has this
17 practice been in effect? Counsel for the NRC staff,
18 how long has this practice been in effect of issuing
19 a license before the evidentiary hearing has been
20 completed?

21 MR. CYLKOWSKI: Your Honor, I don't know
22 how many years it's been in effect. Since that
23 regulation has been enacted, that's the practice.

24 ADMIN. JUDGE ROSENTHAL: This is Judge
25 Rosenthal again. Do you know staff counsel, of any

1 prior instance in which there was the challenge to a
2 renewal of a license, where the license was in fact
3 renewed before there was a hearing on the contentions
4 that were admitted by the Board with respect to
5 whether the operation of the particular facility was
6 causing harm?

7 I mean, this seems to me off hand to be an
8 extraordinary situation that here you have a challenge
9 to a license. The challenge being that the operation
10 of the particular facility is causing substantial
11 harm. And before the Board has an opportunity to hear
12 those contentions, a renewal license is granted.

13 I mean, I realize that perhaps the
14 regulations allow this. But don't you think that this
15 is a rather bizarre situation?

16 MR. CYLKOWSKI: Your Honor, I don't know
17 that I can comment on the wisdom of 10 CFR Section --

18 ADMIN. JUDGE ROSENTHAL: I'm not asking
19 you to comment on wisdom. What I am asking you to do,
20 whether as staff counsel, you're representing the
21 staff, whether you regard this, speaking for your
22 client, as a bizarre situation where contentions
23 addressed to the operation of a plant in the context
24 of a seeking of a renewal license, are not heard and
25 then the renewal license is granted?

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1 I'm asking you as a lawyer representing
2 the staff, whether you think that that's a bizarre
3 situation? I'm not asking you to comment on the
4 wisdom of any regulations.

5 MR. CYLKOWSKI: Your Honor, I'm not aware
6 of another specific instance or case in which this
7 particular time line has been replicated. I do not
8 think it's a bizarre occurrence largely because it is
9 in line with the regulations and is contemplated by
10 the regulations.

11 ADMIN. JUDGE ROSENTHAL: You mean to tell
12 me that there's no situation in which the application
13 of the regulations can't produce a rather absurd
14 situation? I mean, this is a case is it not, where
15 six years have elapsed since the -- five or six years
16 since the application, since a hearing was granted on
17 these contentions.

18 No hearing has been held. All of these
19 years have gone by. And yet still, there's no
20 evidentiary consideration of these challenges to the
21 operation to the plant, and yet a license renewal is
22 granted.

23 Doesn't that seem to you as a lawyer to be
24 a rather strange kind of result?

25 MR. CYLKOWSKI: Your Honor, I would agree

1 there are occasions where perhaps regulations can
2 produce strange results. In this case --

3 ADMIN. JUDGE ROSENTHAL: You don't think
4 this one is strange?

5 MR. CYLKOWSKI: Well, Your Honor, in this
6 case, it's perfectly acceptable for the Intervenors to
7 come to the Board and ask for a stay. And when they
8 do so, the procedure is to look at the four factors
9 and balance them. And determine whether a stay is
10 actually warranted.

11 Now to succeed, the Intervenors need to
12 first and foremost --

13 ADMIN. JUDGE ROSENTHAL: We know -- excuse
14 me for interrupting, but we're all aware of that.
15 What I'm getting at again, is the fact that -- ensure
16 consistent with the regulations, you've issued a
17 renewal of a license in circumstances where six years
18 ago, five years ago, whatever it was, this Board
19 determined that -- six years ago, that this Board
20 determined that these Petitioners were entitled to a
21 hearing on the question as to whether the operation of
22 the mine -- the operation of the mine was causing them
23 irreparable injury.

24 I mean I'm not asking you -- I'm asking
25 you to focus on that. To the situation of where a

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1 license is being issued -- a renewal license is being
2 issued where six years ago there was a challenge to
3 the operation of the plant and there hasn't been any
4 hearing on that Petition. Even though the Board
5 determined that they were entitled to an evidentiary
6 hearing on their contentions.

7 I'm just asking you whether that seems to
8 you to be a rather bizarre situation, whether it
9 complies with the regulations or not?

10 MR. CYLKOWSKI: Your Honor, I don't think
11 that there's a substantial difference because this is
12 a renewal case. I don't think that -- I think that
13 where whether six months or six years is the time
14 that's required to complete the review, I don't think
15 that makes it a particularly bizarre case either.

16 ADMIN. JUDGE GIBSON: You know, it strikes
17 me that this would be an extraordinary -- you know,
18 this could be an extraordinary remedy in a situation
19 where there was a Greenfield site, nobod -- they
20 cannot operate. And you know, that -- people are
21 waiting to operate, they've got their financing,
22 they're you now, all dressed up and got nowhere to go.
23 I could understand that.

24 In this case we have a renewal where the
25 Applicant has been operating under the terms of its

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1 old license. Everybody you know, whether they were
2 happy with it or not, the fact remains until the staff
3 completed its work, it had to -- they could keep
4 operating. And even after they completed their work,
5 they could keep operating until this evidentiary
6 hearing would -- were to be held.

7 But the -- it is really mystifying as I'm
8 sure you can tell from Judge Rosenthal's questions and
9 mine, it is mystifying why this is done in the case of
10 a renewal. And it really frankly makes no sense to
11 me.

12 And I think as you know, the point Mr.
13 Smith raised just a minute ago, it sort of underlines
14 that it could end up causing more problems for the
15 Applicant then not, were a stay to be granted, as
16 opposed to they could continue to operate because
17 there might -- there would have to be findings about
18 likelihood of prevailing on the merits and things like
19 that. Which could, you know, affect its financing and
20 other things.

21 Whereas, if you just waited until the
22 evidentiary hearing was complete, those kinds of
23 things would not even come into focus. You would be
24 looking at when is the -- what terms -- are any
25 additional terms or conditions necessary to be put in

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1 this license based on the concerns that have been
2 raised by the Intervenors?

3 MR. SMITH: But Your Honor, this is Tyson
4 Smith for the Applicant.

5 ADMIN JUDGE GIBSON: Yes.

6 MR. SMITH: I wonder if I could weigh in
7 on this?

8 I think there's a piece of the regulations
9 that have not been discussed that I think really
10 resolve the concern that both you and Judge Rosenthal
11 are raising. And that is for an operating plant, an
12 existing plant like Crow Butte, there is another
13 mechanism available to the Intervenors if they believe
14 that current operations are causing a problem.

15 And that's to seek an Enforcement Order,
16 a 2.206 Petition seeking to modify, rescind, amend the
17 license. And that's specifically what the Commission
18 point out in ruling on --

19 MR. FRANKEL: This is David Frankel for
20 the Consolidated Intervenors. Doesn't this go beyond
21 the agreed ground rules of making additional
22 arguments?

23 It appears Mr. Tyson is bringing in
24 additional arguments from his brief. And the
25 Consolidated Intervenors could not --

1 ADMIN. JUDGE GIBSON: No, no, that's okay
2 Mr. Frankel. We're -- you know, it's okay Mr.
3 Frankel.

4 I believe Judge Rosenthal would like to
5 address the very question you just raised Mr. Smith.

6 ADMIN. JUDGE ROSENTHAL: That section I
7 think I drafted an option some years ago in which I
8 expressed the opinion that 2.206 is in point of fact
9 worthless. I'm so tired of, and I speak just for
10 myself, of people pointing to 2.206 remedy.

11 It's been sought many, many times. And
12 it's virtually never granted. And so yes, they could
13 have pursued that. And as far as I'm concerned, that
14 would have been an idle exercise.

15 MR. SMITH: Well I -- Judge Rosenthal, I
16 appreciate it and I'm familiar with that and your
17 views on this. But I would add that respectfully, at
18 the point at which someone is filing a 2.206 Petition,
19 that means that there is a currently operating
20 facility.

21 Which means that facility has completed
22 NRC staff environmental and safety reviews. And
23 potentially the subject to challenge by intervenors
24 when that initial license was issued.

25 So you know, I think that there would be

1 a reason why you would expect that to occur
2 infrequently. And that's because the staff had
3 already considered and evaluated the environmental
4 impacts and safety risks associated with that
5 facility.

6 So I think that's a natural outcome of the
7 regulatory process at that stage. And I think when
8 you're talking about a renewal here, and as the
9 Commission pointed out to the Intervenors and to the
10 parties in an earlier decision in this proceeding, if
11 the Intervenors believe that current operations were
12 causing significant harm, the approach that they
13 should take was to file a 2.206 Petition. And they
14 haven't done that here.

15 And so that leaves us in the situation
16 where we are where we're applying the normal stay
17 factors that apply here. The staff has issued the
18 license and we have to apply those factors. And they
19 don't in this case warrant issuance of a stay.

20 MR. REID: At some point let me know when
21 you're ready to be -- to hear from the Tribe.

22 ADMIN. JUDGE GIBSON: Yes. We'll get
23 there in just a second.

24 MR. FRANKEL: Your Honor, David Frankel
25 for Consolidated Intervenors. I feel duty bound to

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1 make a correction on the record, even though it cuts
2 against our interest. If you don't mind?

3 I am aware of a Greenfield license having
4 been issued in similar circumstances before the
5 evidentiary hearing in the case of In re: Powertech.
6 So I can't sit idly by while you know, while there's
7 an understanding that other -- other counsel's didn't
8 reference that case.

9 So I want to mention that as a point of
10 disclosure only. And that I am not aware of any
11 renewal license being issued like this before the
12 conclusion of an evidentiary hearing. Thank you.

13 ADMIN. JUDGE GIBSON: Thank you Mr.
14 Frankel. Okay, the Tribe I believe, counsel for the
15 Tribe wanted to say something here.

16 MR. REID: Yes, this is Andrew Reid. A
17 few things.

18 Number one, if the -- as I read 2.1202, it
19 refers to the staff approving or denying an
20 application. It doesn't authorize the staff or refer
21 to the staff actually issuing the license. I think
22 there's a distinction.

23 The staff could certainly state that it
24 approves the application, but withholds the actual
25 issuance of the license until after the evidentiary

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1 proceedings. It's not unusual for the staff's
2 position to be overruled or overturned or questioned
3 or criticized by a subsequent ruling of the Board.

4 Also, 1202 has several exceptions.
5 Exception number one to the staff's action, states
6 that an application to operate a production facility
7 is an exception. Number six says that the production
8 or utilization facility licensing actions that involve
9 significant hazards, considerations as defined in 10
10 CFR 50.92.

11 I think arguably, and I'm not necessarily
12 an expert on these provisions, but it would appear to
13 me that both of those create exceptions for the
14 actions of the staff where it acted without
15 authorization. I personally don't think we even have
16 to get to the stay. I think their action is illegal
17 as a matter of law.

18 I think under the ABA, it's arbitrary,
19 capricious and unreasonable as well as in violation of
20 law. It's in violation of the constitutional rights
21 of the parties to due process, procedural process that
22 they have.

23 In terms of irreparable harm, it
24 interferes with the Government to Government relations
25 that the Tribe has with the United States Government.

1 The Tribe is a sovereign nation and has interests far
2 and above, and broader in scope than any of the other
3 parties to the proceeding, including Crow Butte.

4 And I think that there are other ways of
5 resolving this without even reaching the stay. I
6 think the action of the staff was frankly illegal.

7 And that by the way would address Crow
8 Butte's concern about a finding of likelihood on the
9 merits. There doesn't need to be any finding on that
10 issue because if the action of the staff was
11 unauthorized or illegal under 1202, then the license
12 itself could -- the issuance of the license itself
13 would simply be a nullity or it could be vacated.

14 ADMIN. JUDGE ROSENTHAL: This is Judge
15 Rosenthal. If that were so, you're still confronted
16 with the fact that the -- under the NRC regulations,
17 this facility can continue to operate under its
18 expired license until such time as the evidentiary
19 hearing is held and a determination is made as to the
20 validity of your contentions.

21 In other words the problem that I have is,
22 it seems to me that your stay motion and what you've
23 just offered as to your view of the renewal of the
24 license, doesn't get you anywhere. Because even if we
25 were to determine that the renewal license should not

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1 have been issued, you're still faced with the fact
2 that as for the last six years, this plant has been
3 continuing to operate under its expired license as
4 authorized by a Commission regulation.

5 What frankly surprises me is that you
6 folks didn't go into the Federal court several years
7 ago and argue that you didn't have to exhaust your
8 administrative remedies because of the length of time
9 that the staff was taking in completing its technical
10 review.

11 But today, the plant still continues to
12 operate under expired license. And presumably that's
13 going to continue until there's an evidentiary hearing
14 next summer whether or not the renewal license is
15 stayed.

16 MR. CYLKOWSKI: Your Honor, this is David
17 Cylkowski on behalf of the NRC staff. If I could make
18 a quick point regarding 2.1202.

19 The exceptions that Mr. Reid referred to
20 regarding production facilities, those are -- those
21 involve reactor proceedings under part -- licenses
22 under part 50 or 52. Not a part 40 license uranium
23 recovered facility like we're dealing with here.

24 ADMIN. JUDGE GIBSON: Mr. Reid?

25 MR. REID: Yes.

1 ADMIN. JUDGE GIBSON: Do you dispute what
2 counsel for NRC staff has just indicated? That those
3 only apply to production -- that production facilities
4 require -- do not re -- would not be referring to this
5 kind of facility?

6 MR. REID: I don't see that restriction in
7 the rule.

8 ADMIN. JUDGE GIBSON: Okay.

9 MR. SMITH: This is Tyson Smith for the
10 Applicant. I agree with the NRC staff that none of
11 those exceptions are applicable to a part 40 license.
12 They apply to production utilization facilities which
13 are part 50 or part 52 facilities.

14 It also has an exception for independent
15 spent fuel storage installations and for low level
16 waste repositories, none of which would apply to Crow
17 Butte.

18 ADMIN. JUDGE GIBSON: Okay. Thank you Mr.
19 Smith.

20 All right, Mr. Ballanco, I don't want to
21 not give you a chance to say something. Is there
22 anything else that you need to say about the specific
23 points we've been discussing here with respect to the
24 renewal and that Judge Rosenthal just raised?

25 MR. BALLANCO: Thank you, Your Honor, this

1 is Tom Ballanco. Your Honor, I think you are hitting
2 on the deciding points for my client who themselves
3 are Tribal members and unfortunately have a, I don't
4 know, a historical feeling of being marginalized.

5 Their relations with the Federal
6 Government, so you know, I can't articulate any sense
7 of an economic concern of theirs. But it is a
8 procedural -- it just leaves them with a feeling like
9 they're making a futile effort.

10 But I think you know, Judge Rosenthal has
11 raised all of the salient points.

12 ADMIN. JUDGE GIBSON: Okay. Very well.
13 All right, if we could turn now to what I believe has
14 been hinted at earlier. There is a four factor test
15 set out under 10 CFR 2.1213. And it is as follows.

16 Whether the requestor will be irreparably
17 injured unless a stay is granted. Whether the
18 requestor has made a strong showing that it is likely
19 to prevail on the merits. Whether the granting of the
20 stay would harm other participants. And where the
21 public interest lies.

22 Let's -- without getting into the
23 specifics of any of these factors, with respect to the
24 Consoli -- the Intervenors here, you would agree that
25 as a party seeking this relief, you must come forth

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1 with more than general or conclusory assertions in
2 order to demonstrate your entitlement to a stay, is
3 that correct?

4 MR. FRANKEL: David Frankel for
5 Consolidated Intervenors. Your Honor, I'm not sure
6 that I agree with your statement in the sense that
7 those issues have to be -- those burdens have to be
8 met in terms of getting the contentions admitted.

9 And clearly in order to meet the standards
10 at the evidentiary hearing, it feels like you're
11 skipping ahead to likelihood on the merits in terms of
12 that showing. I believe that just having articulated
13 based on the admitted contentions with the expert
14 testimony and declarations submitted about pathways of
15 ingestion and the cultural resources, that
16 Consolidated Intervenors has clearly demonstrated
17 irreparable harm.

18 And further, by violating the trust
19 responsibility and issuing the renewal license while
20 the Tribe didn't even have a lawyer representing it in
21 the case, is just unconscionable and further
22 constitutes an element and a violation of -- an
23 element of irreparable harm.

24 So from our standpoint, each and every
25 violation of the trust responsibility and the NRC's

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1 duty to provide meaningful consultation, while the
2 Tribal members' health is continued to be put at risk
3 due to pathways of ingestion that have been expressed
4 and supported to the extent necessary at this stage of
5 the proceeding, fully demonstrates irreparable harm.
6 Thank you.

7 ADMIN. JUDGE GIBSON: Well, let's talk
8 about irreparable harm. It is the single most
9 important factor I think under the NRC case law.

10 Let me ask counsel for the NRC staff, it
11 is my understanding that to qualify as an irreparable
12 injury, the potential harm cited by the moving party
13 first must be related to the underlying claim that is
14 the focus of the adjudication. Is that correct?

15 MR. CYLKOWSKI: Yes, Your Honor. We would
16 agree.

17 ADMIN. JUDGE GIBSON: And I take it you
18 would agree with me that under United States versus
19 Jenkins and Quechan Tribe versus United States of
20 Interior, harm to tribal cultural resources can
21 constitute irreparable injury. Is that correct?

22 MR. CYLKOWSKI: Yes, Your Honor. I
23 believe the Board also said as much in the recent
24 Powertech proceeding.

25 ADMIN. JUDGE GIBSON: Okay. Now counsel

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1 for the Tribe, in our initial ruling on whether to --
2 whether the various parties had pleaded admissible
3 contentions back in 2008, this Board admitted the
4 Tribe's contention be that there had been inadequate
5 consultation with the NRC under the National Historic
6 Preservation Act regarding sites of potential
7 historical and cultural significance to the Tribe that
8 might be adversely affected by Crow Butte's operation.

9 But on appeal, the Commission reversed the
10 Board and held that this contention was not yet ripe
11 for adjudication until the NRC staff had completed its
12 environmental assessment. Are you with me so far?

13 MR. REID: Yes, Your Honor.

14 ADMIN. JUDGE GIBSON: Okay. So I note on
15 page seven, paragraph 2A of your moving papers, you
16 allege that the license issuance puts spiritual,
17 cultural, and natural resources of the Tribe and the
18 health of its people at risk of further destruction by
19 licensee's continuing operation and construction
20 activities. Did I read that correctly?

21 MR. REID: Yes.

22 ADMIN. JUDGE GIBSON: Now that the
23 environmental assessment has been issued, presumably
24 your National Historic Preservation Act claims
25 regarding sites of potential historical and cultural

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1 significance to the Tribe that might be adversely
2 affected by these operations, are now ripe for
3 adjudication.

4 Now, let me ask you first, do you plan to
5 file a new contention or contentions regarding the
6 sites of potential historical and cultural
7 significance to the Tribe?

8 MR. REID: Yes, and we have a deadline for
9 that.

10 ADMIN. JUDGE GIBSON: I know you do. But
11 do you plan on filing it on that issue?

12 MR. REID: Yes, at this point.

13 ADMIN. JUDGE GIBSON: Okay, thank you.
14 Now, I have a procedural question for the staff.

15 Counsel for the NRC staff, the Tribe says
16 it will be asserting this National Historic
17 Preservation Act claim regarding sites of potential
18 historical and cultural significance to the Tribe that
19 might be adversely affected by Crow Butte's operation.
20 But as of this moment in time, there is no live
21 contention before us on this subject.

22 So, my question for you is, are we
23 precluded from considering irreparable harm to the
24 Tribe's National Historic Preservation Act claim
25 because there's not admitted contention currently

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1 before us addressing this claim?

2 MR. CYLKOWSKI: Your Honor, if I could
3 have one moment to confer with co-counsel, please?

4 Your Honor --

5 ADMIN. JUDGE GIBSON: Yes.

6 MR. CYLKOWSKI: I don't -- this is David
7 Cylkowski on behalf of the staff. I'm not sure that
8 the Board is precluded from addressing that or from
9 examining the cultural resources claims here.

10 I would think regardless of whether the
11 Board is precluded, the Intervenors haven't met the
12 burden of bringing forth any evidence or declarations
13 or affidavits or information that new cultural
14 resources exist that haven't been identified that are
15 going to be irreparably damaged.

16 Or that the renewed license is not going
17 to protect cultural resources to the same extent as
18 the previously issued license.

19 ADMIN. JUDGE GIBSON: Well, you know, I
20 think you may be getting ahead of us you know, not --
21 even in the merits. Not even at contention
22 admissibility.

23 I'm just talking about purely as this --
24 in the posture this case is in right now, we have no
25 admitted contention because it was not yet ripe for

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1 adjudication. We have no live contention on this
2 question.

3 And the question for me is, I don't know
4 how the other Board members feel, but the question for
5 me is, can we even consider this if there is no live
6 National Historic Preservation Act contention before
7 us as a basis for granting a stay?

8 MR. CYLKOWSKI: No, Your Honor. Without
9 an admitted contention on this issue, we believe it's
10 not appropriate for the Board to rely on that issue as
11 a basis for a stay.

12 Once -- and we know that the deadline for
13 such a contention has not arrived yet. Once that
14 deadline arrives and if that contention is submitted
15 and admitted, then of course Intervenors are free to
16 ask for a stay based on irreparable harms related to
17 that contention.

18 And the factors would have to be applied
19 there once those -- once those issues were before the
20 Board.

21 ADMIN. JUDGE ROSENTHAL: This is Judge
22 Rosenthal again. I would still don't understand how
23 the Petitioners can be irreparably injured by the
24 issuance of the renewal license, given the fact that
25 the plant is still going to operate under its expired

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1 license until such time as the Board has ruled on your
2 contentions.

3 I mean, it seems to me that this whole
4 question of a stay is academic. That the plant is
5 going to continue operating under one license or the
6 other license. And you want it not to operate under
7 the renewal license. That's your stay motion.

8 But you're going to still be faced with
9 the plant operating under its expired license. So
10 you're going to have to explain to me just what is the
11 significance to you of an order by the Board of
12 staying the operation of the renewal license. The
13 plant's still going to run.

14 MR. REID: Your Honor, this is Andrew Reid
15 for the Tribe. If I may address something that hasn't
16 been mentioned in that regard.

17 Once the license has been issued, it
18 becomes a vested interest of Crow Butte. Before that
19 it does not have that character. It does not have all
20 the protections that attach to that. It becomes a
21 vested property interest.

22 It also shifts the burden in regard -- at
23 least I would understand that it shifts the burden in
24 regards to the proof and to the -- each party has to
25 go ahead in this. If the license has been issued,

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1 then the following proceedings become an attack upon
2 the license or a challenge to the license where the
3 burden is actually upon the Intervenors to demonstrate
4 why the license should not be issued.

5 Prior to the issuance of the license, the
6 burden is on the staff and on Crow Butte as to why the
7 license should be issued. I think that's a
8 fundamental shift in the approach of this proceeding.
9 I would expect that Crow Butte and the staff would
10 make arguments later on and it deprives the -- frankly
11 it deprives the Intervenors of their procedural due
12 process rights as well as substance due process
13 rights.

14 And I can't -- I don't think it's harmless
15 at all.

16 MR. FRANKEL: Your Honor, David Frankel
17 for Consolidated Intervenors. I'd like to address
18 Judge Rosenthal's question for a second if I might?

19 The difference is, is that you have a
20 plant operating, yes. A stay of the license would not
21 change the operation of the plant. We all understand
22 this.

23 What we have to remember however, is that
24 Crow Butte Resources' consistent dealings, and the NRC
25 staff's consistent dealings with the Tribe and Tribal

1 members has been characterized by, with due respect,
2 complete ignorance of the responsibilities of
3 meaningful consultation. Meaningful consultation.

4 And the way my clients view it is that
5 they submitted and made a showing under the
6 complicated contention admissibility rules that there
7 was a failure concerning meaningful consultation. And
8 that failure, if true, is by definition irreparable
9 harm.

10 Now yes, the Commission found the
11 technicality of ripeness delayed our ability to
12 express those claims. But no one is suggesting that
13 making the same showing now would change the Board's
14 overall conclusion. In other words, a failure of
15 meaningful consultation.

16 And when the license, the renewal license
17 is issued without an evidentiary hearing, what it
18 tells Tribal members is that meaningful consultation
19 is not something you should expect, even though you
20 have a right to it. And it is -- it's a meaningful
21 violation. It's a meaningful harm. It's something
22 that is felt palpably by a Tribal member.

23 And unfortunately, it's difficult to
24 explain that to persons who are not Tribal members.
25 But as lawyers, we're supposed to go above and beyond

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1 that and find meaning in a violation of a right that's
2 not physical. And that's what we have here. We have
3 a violation of a Tribal Treaty, a trust responsibility
4 right recognized by Federal Indian Law, which we use
5 the words meaningful consultation to express, that has
6 not been done in this case.

7 And I would also remind everyone that in
8 the beginning of this proceeding, the company thought
9 that meaningful consultation constituted sending a
10 notification letter to the Tribe. And we know that
11 that was so weak and so ineffective, and we haven't
12 fully understood what meaningful consultation does
13 mean.

14 But from our standpoint, we've been
15 harmed. We feel the harm. And that's what the Board
16 should be focused on. Thank you.

17 ADMIN. JUDGE GIBSON: This is Judge
18 Gibson. I -- Mr. Frankel, the issue that you've
19 raised is certainly a legitimate question to be raised
20 in a contention. The date for that is in early
21 January. I believe January 5 or 7. And I'm sure
22 we'll be seeing some contentions on this issue of
23 consultation and the National Historic Preservation
24 Act.

25 I think the question that we're focused on

1 -- this Board is focused on, is the question of what
2 has actually taken place since this license was
3 renewed that is different then what happened before
4 the license was renewed?

5 I mean if we're going to be -- if you're
6 going to be asserting, as you all have in your Motion
7 to Stay, that you have suffered an irreparable injury,
8 I'm curious, what has happened between the date that
9 the license was renewed and now that is different then
10 what happened before the license was renewed?

11 Let me start with -- let me start with
12 counsel for the Tribe on that.

13 MR. REED: Well, I just commented on that.
14 The nature of the interest of Crow Butte has changed
15 qualitatively. It's --

16 ADMIN. JUDGE GIBSON: Okay. Fair enough.
17 And we did hear you say that. You said there was a
18 property interest and other things. I -- thank you.

19 Mr. Frankel, what has changed between the
20 date that the license was renewed and now that is
21 different from what happened before the license was
22 renewed?

23 MR. FRANKEL: What has changed is that my
24 clients no longer believe that this proceeding has any
25 integrity or due process backbone. And they basically

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1 feel that it is a sham because their voice has not
2 been heard and they've been squelched.

3 So with due respect and no intention to
4 cast dispersions because that's not how I feel
5 necessarily. But I have to say that if you want to
6 create a feeling among people that there's no
7 integrity to this process as was echoed in the Rapid
8 City Journal editorial page when this happened in
9 Powertech, yes, the Government might have the ability
10 to do it under its own regulations, but it gives the
11 appearance of shoving it down the people's throat and
12 that's how they feel.

13 So if you want to consider that a harm or
14 not, that's up to you. But that's quite honestly how
15 they feel. That they've wasted six years going around
16 in circles in an administrative process. And it
17 doesn't matter because they issued the license before
18 the hearing.

19 ADMIN. JUDGE GIBSON: Thank you Mr.
20 Frankel. Mr. Ballanco?

21 MR. BALLANCO: Thank you, Your Honor. I'd
22 echo what both of my co-counsels said there. It --
23 because the mine has been operating under the old
24 conditions, effectively today is not different then
25 the day before the license has changed in terms of

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1 what is happening at the site.

2 But what has changed is the perception on
3 behalf of our clients as to what kind of procedure
4 they are faced with. What kind of fair and impartial
5 hearing they're going to be faced with.

6 Irregardless of what that may actually be,
7 the perception is that this is a done deal. And that
8 you know, we're just going through the motions.

9 ADMIN. JUDGE GIBSON: Well, I appreciate
10 the concerns that Mr. Frankel and you have raised and
11 Mr. Reid as well, with respect of the perception of
12 the people in the community. I don't really know how
13 to address that other than to tell you it's
14 unfortunate.

15 You know, I think that this Board has done
16 as well as it can under the circumstances to try to
17 make sure that we provide an opportunity for people to
18 address the concerns and prosecute the claims that
19 they have in a fair way. But you know, there's not a
20 lot I can do about that.

21 But I do think that we do -- there are
22 really as I understand it, two things that you have
23 alleged in your moving papers. If you look at what
24 the Tribe and the Consolidated Petitioners have said,
25 essentially they have said there's two things.

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1 There is groundwater contamination and
2 there is -- there are artifacts, burial mounds, it's
3 historic sites of some kind that may be impacted. And
4 these are two things that you all have alleged.

5 And the question that I keep coming back
6 to is what -- what is different in the last few weeks,
7 or is going to be different in the next few months
8 that happened before this license was renewed.

9 Irrespective of whether this is a bad
10 policy, I think you know, maybe could almost all
11 agree, it's probably not a really good policy. But --
12 to renew a license while an evidentiary hearing is
13 proceeding.

14 But, irrespective of that, what has really
15 change out there on the ground? I can't really
16 address people's feelings. I don't think the Board is
17 going to be in much of a position to do that. But I
18 think what we can do is try to look at what specific
19 things have changed or will change until this
20 evidentiary hearing is completed.

21 And I'm having a little difficulty seeing
22 that anything specific has changed or will change that
23 would be any different then had the license not been
24 renewed. And I think that that is a serious question
25 that we're going to have to consider when we determine

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1 whether a stay can be granted.

2 ADMIN. JUDGE ROSENTHAL: I would -- this
3 is Judge Rosenthal. I would endorse the -- what Judge
4 Gibson just stated. And make one other point. And
5 that is the delay in the conduct of the evidentiary
6 hearing over all of these years is not to be placed at
7 the doorstep of the Board.

8 It doesn't reflect anything with respect
9 to the Board's independence and the Board's
10 consideration, seriously, impartially, the merits of
11 the contention. The reason that there is this delay
12 is because as a practical matter, the Board was not in
13 the position to consider from the merits, the
14 contentions.

15 In other words, was not in a position to
16 hold a hearing until the NRC staff completed its
17 technical review. And it was the NRC staff as I think
18 Judge Gibson noted at the beginning of this oral
19 argument, consistently extended the time for the
20 completion of its technical review.

21 And it was that fact that was responsible
22 for what still seems to me to be a bizarre situation
23 where six years after the Board determined that Crow
24 Butte, that excuse me, that Petitioners were entitled
25 to a hearing. That on the renewal of the license, the

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1 license issued without the hearings having taken
2 place.

3 So I think that when the Petitioners are
4 looking at this, they should appreciate the fact that
5 the Board was not responsible for any of this delay.
6 This was all at the hands of the staff which
7 apparently saw no necessity for any kind of expedition
8 in conducting its evidentiary, excuse me, its
9 technical review.

10 Extension after extension after extension,
11 which in some of the cases, there wasn't even a reason
12 assigned for it. And unfortunately, under Commission
13 precedent, the Board has no authority to superintend
14 to any extent, the staff's conduct of its statement
15 for review, either substantively or from the
16 standpoint of the alacrity or nonalacrity of the
17 process.

18 So I just think that the Petitioner should
19 keep that in mind. That this has nothing at all to do
20 with whether it will get a fair hearing on its
21 contentions. It will clearly get a fair hearing. And
22 again, the delay is totally -- it was on the staff.

23 ADMIN. JUDGE GIBSON: I believe that
24 concludes the questions that the Board had. I told
25 you all that if somebody really felt they just

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1 absolutely had to speak, we could hold -- they could
2 -- it would be afforded a closing of no more than two
3 minutes.

4 Let me ask, is there anyone who feels that
5 we really need to have that closing?

6 MR. FRANKEL: David Frankel for
7 Consolidated Intervenors. I'll take two minutes.

8 ADMIN. JUDGE GIBSON: Okay, well if you're
9 going to take it, then I guess everyone else is going
10 to need to get two minutes. So go ahead Mr. Frankel,
11 we'll let you start.

12 MR. FRANKEL: Great. Well, I just want to
13 thank Judge Rosenthal for making that last comment.
14 I can speak for Consolidated Intervenors and myself
15 especially that I don't have any feeling that this is
16 "the Board's fault."

17 Secondly, I want to add some context. The
18 reason why it appears to me the staff kept putting
19 that off is because Crow Butte, Powertech and the
20 Tribe, not Consolidated Intervenors, were involved in
21 negotiations over a so called programmatic agreement
22 on how to handle the identification and protection of
23 cultural resources.

24 That is what needed to be done and
25 completed at least to the extent and over the

1 objections of the Tribe. But it was completed from
2 the standpoints of the staff, CBR, Powertech and the
3 State of South Dakota.

4 And so that needed to be done before the
5 environmental assessment. So I really, even though
6 I'm using up my two minutes here, it wasn't -- the
7 staff probably couldn't expedite through the
8 programmatic agreement any faster than they did. And
9 I feel that that was a bungled operation for reasons
10 we'll mention in our newly filed contentions.

11 But in closing I just want to say that you
12 know, rather than point fingers about the delay and
13 where we are, and gee, it would have been great if
14 they hadn't issued this license. If there's a way for
15 this Board to exercise its right as a court of equity
16 and look at the public interest, which does favor the
17 appearance of a fair and contested hearing.

18 And you know, I just also finally conclude
19 that we cited some cases that say that asserted
20 economic damages from the delay of a stay are not
21 sufficient or relevant if any showing of irreparable
22 harm has been made.

23 So I would ask the Board to consider that.
24 And you know, if we have a bad situation that wasn't
25 the fault of Tribal members, I would like it to not be

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1 burdened on the Tribal members again. Thank you.

2 ADMIN. JUDGE GIBSON: Counsel for the
3 Tribe?

4 MR. REID: Thank you. I think the focus
5 really should be on the arbitrariness of the action by
6 the staff. 1202 I think talks about the approval. It
7 doesn't talk about the issuance of the license.

8 I think the issuance of the license is a
9 violation of the APA. It's a violation of the due
10 process rights of all the Intervenors. It's a
11 violation of the -- and I think importantly is it's --
12 the comprise I'd like to mostly concentrate on from
13 the Tribe's perspective is that it has a Government to
14 Government relationship with the United States.

15 If this had been South Dakota instead of
16 the Tribe, South Dakota is right across the border
17 from Crow Butte. If they had been concerned about
18 some of the impacts of Crow Butte, it would have filed
19 contentions, a challenge to the renewal.

20 I would really have to question whether or
21 not it would have been appropriate for the staff to go
22 ahead and issue the license when there were existing
23 contentions. As well as a time -- a date set for
24 renewed and amended contentions as well as that the
25 date, even the date for the evidentiary hearing had

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1 not even been issued. I think it would have been the
2 utmost cavalier of conduct by the staff and the NRC
3 towards the State of South Dakota had that occurred.

4 The Oglala Sioux Tribe is a sovereign
5 nation. It has a Government to Government
6 relationship with the United States. The NRC has
7 several policies that it's issued in regards to how
8 the NRC is to approach its relationships with the
9 Government. And it includes consultation.

10 We would argue consent. Consultation is
11 defined by the UN Declaration of the Rights of
12 Indigenous People which was signed by this Government.
13 It should be used to interpret what is meant by
14 consult. And consult means that it has to be more
15 then meaningful. It has to obtain the consent of the
16 Tribe.

17 That has not been done. We still have a
18 time for contentions. The Tribe intends to submit
19 additional contentions for the consideration by the
20 NRC. Evidentiary proceedings will have to be held on
21 any of those that are admitted as well as the three
22 that are currently before the NRC.

23 So the entire matter is premature. It's
24 a violation of law. And the license renewal is void
25 as a matter of law. I think a ruling of the Board

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1 that it's in violation of law would be sufficient. It
2 doesn't even need to reach the request for a stay.

3 ADMIN. JUDGE GIBSON: Mr. Ballanco, you've
4 heard your two colleagues here. Is there anything
5 else you want to add?

6 MR. BALLANCO: Your Honor, I think they
7 have, especially with what Mr. Reid just said. I did
8 want to just mention that while we're all on the call
9 here, that the dates suggested for the evidentiary
10 hearing, fall directly on the sacred ceremony of two
11 of our clients.

12 And I just want that to be taken into
13 consideration that as we're talking about issues of
14 trust, responsibility and considering the concerns,
15 particularly the culturally relevant concerns of these
16 Tribal members, that we consider these Sundance
17 ceremonies when planning our evidentiary hearing.

18 ADMIN. JUDGE GIBSON: Well, that's fine
19 Mr. Ballanco. It was my impression that Mr. Sciretta
20 had actually considered that very thing. And that's
21 why he picked those dates.

22 And in fact had tried not to have them
23 fall on the Sundance ceremony. So before we go too
24 far down that path, I would very much appreciate you
25 making sure that you all provide him with some emails.

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1 Because I'm amazed, you know, you all
2 can't even find a way to agree on a time. I mean
3 that's not terribly complicated. He's pulling his
4 hair out trying to get a date.

5 And so, I would again encourage you all to
6 please work together, work with Mr. Sciretta. I'm not
7 going to try to get a date set. But if you all can't
8 agree on one, I guarantee I'm going to put one --
9 we'll put one down that no one's going to be happy
10 with if that's what we have to do.

11 So please, consult with your clients. Try
12 to get them to bend a little bit and let's get this
13 done. But the sooner we get this done, the more the
14 feelings of people will be I hope, that they have been
15 afforded a fair and adequate opportunity to prosecute
16 their claims. And to get to the truth of what is at
17 issue.

18 And the longer this is delayed, the worse
19 that's going to happen. So I'm not going to say any
20 more about this date on this call. But I encourage
21 you, go back to your clients and to let Mr. Sciretta
22 know if we can find a way to get it in that time
23 period.

24 Okay. Counsel for the NRC staff, is there
25 anything that you wish to say in closing?

1 MR. CYLKOWSKI: Just briefly, Your Honor.
2 This is David Cylkowski.

3 The narrow issue before the Board on these
4 Motions is whether the four factors in 2.1213(d)
5 weight in favor of granting a stay. And the threshold
6 issue, the first issue under those factors is whether
7 the Movants have brought forth some sort of evidence,
8 something more than their assertions to demonstrate
9 that they will be irreparably harmed if the Board does
10 not grant the stay.

11 Here and the Board referred to it, that
12 means there needs to be something different about the
13 renewed license that will cause irreparable harm.
14 Something that was not in the old license.

15 And the Movants haven't identified
16 anything in the renewed license that will cause
17 certain great, imminent, irreparable injury. And
18 therefore, we maintain a stay is not appropriate.
19 Thank you.

20 ADMIN. JUDGE GIBSON: Thank you. Mr.
21 Smith?

22 MR. SMITH: Yes, this is Tyson Smith for
23 the Applicant Crow Butte Resources. I'll be very
24 brief.

25 As Mr. Cylkowski pointed out, the Board

1 isn't called upon here to address the legality or
2 really even the wisdom of the NRC staff, the NRC
3 regulations authorizing the issuance of a renewed
4 license. But rather the question is whether the stay
5 motion should be granted here.

6 None of the factors that are relevant to
7 the stay request support granting the Motion. Neither
8 the Consolidated Intervenors nor the Tribe have
9 demonstrated that they will be irreparably harmed if
10 the Board declines to grant a stay in this case. Nor
11 have they shown that they're likely to prevail on the
12 merits at a hearing.

13 The arguments that we've heard in support
14 of the Motion are raw on speculation or conclusory
15 statements that cannot justify the extraordinary
16 remedy of a stay. And the Board should deny the
17 Motion.

18 ADMIN. JUDGE GIBSON: Thank you, Mr.
19 Smith. All right, counsel, is there anything further
20 that we need to address before we conclude this oral
21 argument?

22 MR. CYLKOWSKI: Nothing from the staff.

23 ADMIN. JUDGE GIBSON: Okay.

24 MR. SMITH: Nothing from the Applicant.

25 MR. REID: Nothing from the Tribe.

1 MR. FRANKEL: Nothing from -- David
2 Frankel for Consolidated Intervenors. Nothing from
3 us, thank you.

4 ADMIN. JUDGE GIBSON: All right. Hearing
5 nothing and everybody in agreement we're not -- we
6 will stand adjourned.

7 We will be issuing an order with respect
8 to this -- to these Motions to Stay. And we will
9 await the arrival of presumably new and amended
10 contentions.

11 And most of all, I want to emphasize that
12 I will -- we the Board will really appreciate it if
13 you all will find a date that is going to work for a
14 hearing in the spring or summer. I think it will go
15 a long way toward addressing some of the feelings that
16 people have that this is some kind of unfair process.

17 Thank you. And Merry Christmas. We will
18 look forward to hearing from you soon. Good day.

19 MR. CYLKOWSKI: Thank you and Merry
20 Christmas and Happy Hanukkah

21 (Whereupon, the above-entitled matter went
22 off the record at 12:22 p.m.)
23
24
25