LBP-15-2

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Michael M. Gibson, Chairman
Dr. Richard E. Wardwell
Brian K. Hajek
Alan S. Rosenthal (Special Assistant to the Board)

In the Matter of	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	ASLBP No. 08-867-02-OLA-BD01
(License Renewal for the In Situ Leach Facility, Crawford, Nebraska)	January 21, 2015

MEMORANDUM AND ORDER
(Denying Applications for Stay of Source Materials License SUA-1534)

I. Introduction

On November 6, 2014, the NRC Staff notified the Board and parties that, pursuant to 10 C.F.R. § 2.1202(a), it had issued renewed Source Materials License SUA-1534 to Crow Butte Resources, Inc. (Crow Butte).[1] SUA-1534 "allows [Crow Butte] to possess and use source and byproduct material in connection with its Crow Butte in situ uranium recovery facility in Dawes County, Nebraska."[2] This notification triggered the five day filing deadline established by 10

[1] The renewed license expires on November 5, 2024. License Renewal Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Nov. 6, 2014). The agency generally issues materials licenses for ten-year terms. 10-Year License Terms for Materials Licensees, 62 Fed. Reg. 5,656 (Feb. 6, 1997). Due to NRC Staff review delays, the renewed license does not expire until sixteen years and eight months after the previous license expired.

[2] Id. at 1.

C.F.R. § 2.1213 to apply for a stay of the license. The Board subsequently set November 14, 2014 as the deadline for Intervenors to apply for a stay of the effectiveness of SUA-1534.[3]

Both intervenors in this proceeding, Consolidated Intervenors[4] (CI) and the Oglala Sioux Tribe[5] (the Tribe), filed applications for a stay of license SUA-1534. Crow Butte[6] and the NRC Staff[7] filed answers to the stay applications. A telephonic oral argument on the stay applications was held on December 19, 2014.[8]

II. Background

Crow Butte's license was first issued in 1988 for a ten-year term, and renewed in 1998 for an additional ten years. A second renewal application, at issue in this proceeding, was filed on November 27, 2007, three months before the license expired on February 28, 2008.[9] The timing of this application enabled Crow Butte to operate under the NRC's "timely renewal" provision until the agency renewed the license.[10]

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[3] Licensing Board Order (Computing Time for Filing a 10 C.F.R. § 2.1213(a) Stay Application) (Nov. 7, 2014) (unpublished).

[4] Consolidated Intervenors' Application for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213 (Nov. 14, 2014) [hereinafter CI Stay Application].

[5] Application The Oglala Sioux Tribed [sic] for a Stay of the Issuance of License No. SUA-1534 Under 10 CFR Section 2.1213 (Nov. 14, 2014) [hereinafter OST Stay Application].

[6] Crow Butte Resources' Response Opposing Motions for Stay of Effectiveness of Renewed License (Nov. 24, 2014) [hereinafter CBR Response].

[7] NRC Staff's Opposition to Applications for a Stay Introduction (Nov. 24, 2014) [hereinafter Staff Opposition].

[8] See Tr. at 507–64.

[9] Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (Oct. 2014) at viii.

[10] See 10 C.F.R. § 40.42(a); see also 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal . . ., a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.").

On March 28, 2008, the Staff accepted the renewal application for technical review, and on May 27, 2008, a notice of opportunity for hearing to contest the license renewal was published in the Federal Register.[11] On July 28, 2008, several hearing requests were received in response to that notice.[12] On August 14, 2008, this Board was established, and on November 21, 2008, it issued its decision that, among other things, (1) determined the Tribe had standing and admitted its contentions A, C, and D, and (2) determined CI had standing and admitted its contention F.[13] Contentions A, C, and D allege that the radiological and non-radiological impacts from the Crow Butte in situ leach (ISL) mining project are or may impact the environment and local residents' health.[14] Contention F alleges that Crow Butte has failed to include recent research in its filings.[15] These contentions, in a general sense, convey the concern that the operation of the Crow Butte ISL mine is physically harming Tribe members.

On January 8, 2009, the Board entered an order in which it noted that the Staff estimated a December 2009 date for the completion of its final environmental review document and directed the Staff to file brief monthly reports advising the Board whether the estimated date for completion of that document or the Safety Evaluation Report[16] had changed or become more

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[11] Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, 73 Fed. Reg. 30,426 (May 27, 2008).

[12] See Request for Hearing and/or Petition to Intervene, Oglala Sioux Tribe (July 28, 2008); Consolidated Request for Hearing and Petition for Leave to Intervene (July 28, 2008); Request for Hearing and Petition for Leave to Intervene, Oglala Delegation of the Great Sioux Nation Treaty Council (July 28, 2008).

[13] LBP-08-24, 68 NRC 691 (2008). Other contentions that the Board admitted were found inadmissible by the Commission on appeal. See CLI-09-9, 69 NRC 331, 366 (2012).

[14] LBP-08-24, 68 NRC at 716, 724–25.

[15] Id. at 738.

[16] The Staff notified the Board and parties of the public availability of the final Safety Evaluation Report on January 2, 2013. Safety Evaluation Report Availability Notification, Letter from Brett Klukan, NRC Staff Counsel, to Administrative Judges and Parties (Jan. 2, 2013). In August 2014 the Staff issued a Revised Safety Evaluation Report. Revised Safety Evaluation Report

definite.[17] In compliance with that directive, the NRC Staff submitted monthly status reports beginning in January 2009 that continued until, seventy months later, the Staff released the final environmental review document, an Environmental Assessment (EA), in October 2014.[18]

Thirty of those status reports informed the Board of slippages in the estimated date of completion of the final environmental review document. An Appendix to this Order lists the month and year in which each of those thirty reports was submitted, together with the explanation (if any) given by the Staff for the announced slippage. None of the explanations attributed a slippage to limited Staff resources.

In March 2011, following the Staff's ninth report of a slippage in the estimated date for completion of the final environmental review document, the Board issued a Memorandum requesting the Staff to provide an explanation for the continuing delays.[19] In response, the Staff reported that it was "currently taking steps necessary to identify the presence of historic properties within the area" in accordance with the National Historic Preservation Act,[20] and that it had scheduled a meeting to consult with affected Indian Tribes in June 2011.[21] The Staff did

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Availability Notification, Letter from David Cylkowski, NRC Staff Counsel, to Administrative Judges and Parties (Aug. 20, 2014).

[17] Initial Scheduling Order (Jan. 8, 2009) at 2, 4–5 (unpublished).

[18] Final Environmental Assessment for the License Renewal of U.S. Nuclear Regulatory Commission License No. SUA-1534 (Oct. 2014).

[19] Memorandum (Requesting Report from the NRC Staff) (Mar. 29, 2011) at 4 (unpublished).

[20] 16 U.S.C. § 470 et seq.; in addition to the National Historic Preservation Act, such properties may also be protected by the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 et. seq.; and by the Archaeological Resources Protection Act (ARPA), 16 U.S.C. § 470aa et seq.; see LBP-08-24, 68 NRC at 713 & n.105.

[21] NRC Staff's Submittal in Response to March 29, 2011 Memorandum Requesting Report from the NRC Staff (Apr. 15, 2011) at 4–5.

not give any reason why these actions had not been initiated long before June 2011.[22] Finally, the Staff's response stated that its projected date for completing the environmental review document had been pushed back yet again, from August to December 2011.[23]

By October 2011, the Staff's estimated completion of its final environmental review document had slipped another eight months, to August 2012.[24] This was 32 months beyond the original predicted date of issuance–from December 2009 to August 2012. The Board issued another Memorandum, this time "to bring to the Commission's attention a potential deprivation of the Tribe's hearing rights guaranteed to it by Section 189a of the Atomic Energy Act."[25] The Board questioned whether this statutory concern had been raised by the extreme delay in hearing the Tribe's injury claim.[26] While the Board recognized it could not superintend the conduct of the NRC Staff's technical reviews,[27] it suggested that "the Commission might deem it appropriate to ensure that the Staff will give priority" to environmental reviews, especially when, despite a pending serious challenge to renewal, the applicant was continuing mining operations.[28]

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[22] At oral argument on October 1, 2008 (two months before the Staff announced its December 2009 expected completion date for the final environmental review document), the Staff informed the Board that "this process has begun . . . NRC personnel have been in contact with personnel in the Tribe, and this is ongoing and will occur." Tr. at 363–64.

[23] NRC Staff's Submittal in Response to March 29, 2011 Memorandum Requesting Report from the NRC Staff (Apr. 15, 2011) at 5.

[24] Estimated Issuance Dates, Letter from Brett Klukan, NRC Staff Counsel, to Administrative Judges and Parties (Oct. 14, 2011).

[25] LBP-11-30, 74 NRC 627, 628 (2011).

[26] Id. at 631.

[27] Duke Energy Corp. (Catawba Nuclear Station, Units 1 & 2), CLI-04-6, 59 N.R.C. 62, 67 (2004).

[28] LBP-11-30, 74 NRC at 633.

The Commission responded to the Board's concerns in February 2012, and did not agree that the Tribe may have been deprived of its hearing rights.[29] Instead, the Commission was satisfied that the Staff was conducting its reviews "on an ongoing basis" and found that the Staff's "efforts appear reasonable."[30] The Commission also found it significant that the Tribe itself had not asserted prejudice or harm by delay.[31] The Commission declined to take any action, and Staff delays continued to accumulate for twenty-six additional months.

On October 27, 2014, four years and ten months after the initially predicted issuance date, the Staff notified the Board and parties that the final environmental review document had been completed.[32] Ten days later, the Staff notified the Board that it had issued a renewed license with an expiration date of November 5, 2024,[33] which in turn precipitated the instant applications to stay that renewal.

III. Legal Standards

The stay of an NRC license is an extraordinary remedy, and a rare occurrence in NRC practice.[34] If granted, a stay preserves the status quo until a decision is made on the merits of

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[29] CLI-12-4, 75 NRC 154 (2012).

[30] Id. at 157.

[31] Id. at 158.

[32] Environmental Assessment Availability Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Oct. 27, 2014).

[33] License Renewal Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Nov. 6, 2014). During the December 19, 2014 oral argument, the Staff advised the Board that the timing of the license issuance was informed by the 10 C.F.R. § 2.1202(a) instruction for the Staff "to promptly issue its approval or denial of the application" consistent with its findings, and despite the pendency of a hearing. Tr. at 518–19. The Board notes that, however, 10 C.F.R. § 2.1202(a) does not define a "prompt" issuance as an immediate one.

[34] U.S. Dep't of Energy (High-Level Waste Repository), CLI-05-27, 62 NRC 715, 718 (2005) (treating a stay as "an extraordinary equitable remedy" (quoting Pub. Serv. Co. of N.H. (Seabrook Station, Units 1 and 2), CLI-77-27, 6 NRC 715, 716 (1977)).

the underlying controversy. In determining whether to grant or to deny an application for a stay, a Board must balance four separate interests: "(1) Whether the requestor will be irreparably injured unless a stay is granted; (2) Whether the requestor has made a strong showing that it is likely to prevail on the merits; (3) Whether the granting of a stay would harm other participants; and (4) Where the public interest lies."[35] The movant has the burden of persuasion on these four factors.[36]

Discussing these four factors in the context of 10 C.F.R. § 2.342(e), the Commission stated that "of these factors, irreparable injury is the most important."[37] And for a potential injury to be irreparable, it must be shown to be "imminent[,] . . . certain and great."[38] Upon a strong showing of irreparable injury, "a movant need not always establish a high probability of success on the merits."[39] But even if a party moving for a stay fails to show irreparable injury, a Board may still grant a stay if the movant has made "an overwhelming showing" or a demonstration of "virtual certainty" that it will prevail on the merits.[40] Where the movant cannot show either irreparable injury or a likelihood of prevailing on the merits, a Board "need not consider the

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[35] 10 C.F.R. § 2.1213(d).

[36] Pub. Serv. Co. of Ind. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-493, 8 NRC 253, 270 (1978); Ala. Power Co. (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981).

[37] S. Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-12-11, 75 NRC 523, 529 (2012) (citing Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 151 (2010) and David Geisen, CLI-09-23, 70 NRC 935, 936 & n.4 (2009)).

[38] Vogtle, CLI-12-11, 75 NRC at 529 (quoting Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006)).

[39] Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 746 n.8 (1985) (quoting Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985)).

[40] Vogtle, CLI-12-11, 75 NRC at 529 (quoting AmerGen Energy Co. (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) and Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 154 (2010)).

remaining factors."[41] In addressing the stay criteria in a Subpart L proceeding, "a litigant must come forth with more than general or conclusory assertions in order to demonstrate its entitlement" to relief.[42]

IV. Discussion

A. Irreparable Injury

To qualify as an irreparable injury, the potential harm cited by the moving party first "must be related" to the underlying claim that is the focus of the adjudication.[43] Here, the Tribe and CI both base their stay applications on the risk of irreparable injury to (1) cultural resources through construction and operation activities, and (2) tribal members' health through contamination of ground and surface water from the Crow Butte site.[44] Intervenors also generally allege that the Staff has not engaged in meaningful consultation with the Tribe, and assert that this violation of the trust responsibility of the federal government "constitutes an additional incident of irreparable harm."[45]

Regarding harm to cultural resources, Crow Butte argues that because there is no active cultural resources contention, and irreparable harm must relate to a claim in the adjudication, harm to cultural resources cannot support a motion for a stay.[46] The NRC Staff opposes the

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[41] Vogtle, CLI-12-11, 75 NRC at 529.

[42] Babcock & Wilcox (Apollo, Pa. Fuel Fabrication Facility), LBP-92-31, 36 NRC 255, 263 (1992) (citing U.S. Dep't of Energy (Clinch River Breeder Reactor Plant), ALAB-721, 17 NRC 539, 544 (1983)).

[43] Vogtle, CLI-12-11, 75 NRC at 530–31 (quoting United States v. Green Acres Enters., Inc., 86 F.3d 130, 133 (8th Cir. 1996)).

[44] CI Stay Application at 4–5; OST Stay Application at 7.

[45] CI Stay Application at 5; OST Stay Application at 7.

[46] CBR Response at 3.

stay on the basis that Intervenors failed to demonstrate specific harm to cultural resources, and instead provided only "general allegations that lack sufficient specificity."[47]

In this proceeding, there is currently no admitted cultural resources contention. In 2008, the Board admitted the Tribe's Contention B, which claimed that the NRC Staff had not consulted the Tribe for the purposes of identifying cultural resources in the license renewal area.[48] But, on appeal, the Commission reversed the Board's decision.[49] While recognizing that the issue of consultation with the Tribe was material and within the scope of the proceeding, the Commission nevertheless held that Contention B was not ripe for adjudication until the Staff's NEPA review was complete.[50] The Staff has since issued its EA, and on January 5, 2015, Intervenors timely filed new cultural resources contentions.[51]

In its decision relating potential irreparable injuries to the underlying claims in an adjudication,[52] the Commission cited a decision in which the Eighth Circuit found that an injury that had never been the focus of a lawsuit could not constitute irreparable harm.[53] However, in this proceeding a cultural resources contention previously had been a focus of the suit, and has again been proposed by Intervenors. The Board therefore declines to invalidate Intervenors' irreparable harm to cultural resources allegation on this basis.

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[47] Staff Opposition at 3.

[48] LBP-08-24, 68 NRC 691 at 719.

[49] CLI-09-9, 69 NRC 331 at 350–51.

[50] Id. at 349–51.

[51] Consolidated Intervenors' New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015) at 4; The Oglala Sioux Tribe's Renewed and New Contentions Based on the Final Environmental Assessment (October 2014) (Jan. 5, 2015) at 14.

[52] Vogtle, CLI-12-11, 75 NRC at 530–31.

[53] Nat'l Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 733 (8th Cir. 1986) (finding that a key consideration was that "this sort of injury has never been the focus of the present lawsuit").

Moreover, harm to tribal cultural resources does constitute irreparable injury.[54] In a federal district court case granting a preliminary injunction halting a solar energy project, the Quechan Tribe claimed that the project would not avoid most of the 459 cultural sites identified, and that the NEPA and NHPA process had been insufficient.[55] In determining that the irreparable harm element of the test for issuance of injunctive relief was met, the court found that the Quechan Tribe's evidence showed that phase one of the project would involve damage to at least one known site, and "virtually ensure[d] some loss or damage."[56]

Here, however, CI's and the Tribe's general allegations, including their trust-based claim, were submitted without supporting declarations, and lacked the specificity and sufficient details needed to demonstrate serious, immediate, and irreparable harm to cultural and historic resources. As the Eighth Circuit has said, "a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief."[57] Intervenors have presented no evidence that Crow Butte's mining poses either imminent or certain harm to cultural resources. As a result, the Board cannot find that a clear and present need exists for a stay under a claim of harm to cultural resources.

With respect to Intervenors' claim of contamination of ground and surface water, Crow Butte argues that Intervenors allege only a risk of speculative harm, without showing imminent or certain and great harm.[58] Similarly, the NRC Staff argues that Intervenors fail to provide any

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[54] United States v. Jenkins, 714 F. Supp. 2d 1213, 1222 (S.D. Ga. Dec. 5, 2008) ("Harming Native American artifacts would constitute an irreparable injury because artifacts are, by their nature, unique, and their historical and cultural significance make them difficult to value monetarily.").

[55] Quechan Tribe v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1106–07 (S.D. Cal. Dec. 15, 2010).

[56] Id. at 1120.

[57] Iowa Util. Bd. v. FCC, 109 F.3d 418, 425 (8th Cir. 1996).

[58] CBR Response at 3–4.

reliable data, affidavits, or specific pathways of water contamination that establish imminent, certain and great harm.[59]

During oral argument, the Board asked Intervenors to explain what actual changes or injuries have emerged due to the Staff's issuance of Crow Butte's renewed license.[60] The Tribe responded that:

> once the license has been issued, it becomes a vested interest of Crow Butte. Before that it does not have that character. It does not have all the protections that attach to that. . . . It also shifts the burden in regard – at least I would understand that it shifts the burden [so] the burden is actually upon the Intervenors to demonstrate why the license should not be issued.[61]

CI commented that the issuance of the license leaves the involved parties no longer believing "that this proceeding has any integrity or due process backbone. And they basically feel that it is a sham because their voice has not been heard and they've been squelched. . . . The perception is that this is a done deal."[62]

Taking all of Intervenors' claims into account, the Board observes that Intervenors have not shown with the requisite specificity that Crow Butte's mining poses either imminent or certain harm to the health of Tribe members. In addition, the burden of proof in this proceeding has not been shifted by the NRC Staff's license renewal,[63] which is not yet final agency action.[64]

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[59] Staff Opposition at 4.

[60] Tr. at 550.

[61] Tr. at 546–47.

[62] Tr. at 550–52.

[63] The applicant, Crow Butte, as proponent of the license renewal, has the ultimate burden of proof in this proceeding. "Unless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof." 10 C.F.R. § 2.325; see also 5 U.S.C. § 556(d) ("The proponent of a rule or order has the burden of proof.") Another Board, commenting on an intervenor challenge to an environmental report, observed that, once challenged, "there is no presumption that the [environmental report] is correct or accurate. To the contrary, the applicant, as the proponent of the license, bears the burden of proof." Progress Energy Fla., Inc. (Levy County Nuclear Power Plant, Units 1 and 2), LBP-09-10, 70 NRC 51, 101 (2009).

Accordingly, based on Intervenors' non-specific health injury or burden shifting claims, the Board cannot find that there is the clear and present need required for the imposition of a stay.[65]

Finally, even were the Board to find that continued operation of Crow Butte's ISL mine would cause Intervenors irreparable harm, staying the renewal of Crow Butte's license would not prevent these injuries from continuing. The company could still continue to operate the mine under the agency's timely renewal provision.[66] As a result, the injuries Intervenors allege are not redressable by the Board staying the renewed license. Staying the license would have no practical effect, and the Board declines to issue such an order.[67]

B. Likelihood to Prevail on the Merits

Even where a party moving for a stay fails to show irreparable injury, a Board may still grant a stay if the movant has made "an overwhelming showing" or a demonstration of "virtual certainty" that it will prevail on the merits.[68] As reviewed above, at this point in the proceeding,

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The burden of NEPA compliance lies with the NRC Staff. Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983).

[64] See infra note 66.

[65] A party seeking a stay must specifically and "reasonably demonstrate [an injury], not merely allege" generalized harm. Phila. Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-814, 22 NRC 191, 196 (1985).

[66] See 10 C.F.R. § 40.42(a); see also 5 U.S.C. § 558(c) ("When the licensee has made timely and sufficient application for a renewal . . ., a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."). Crow Butte's license renewal application has not been finally determined by the agency until all administration actions have been completed, including issuance of this Board's Initial Decision. Bennett v. Spear, 520 U.S. 154, 178 (1997) (finding agency action to be final at the "consummation of the agency's decisionmaking process," and when "rights or obligations have been determined").

[67] See Licensing Board Order (Removing Temporary Stay and Denying Motions for Stay of Materials License Number SUA-1600), Powertech USA, Inc. (Dewey-Burdock In Situ Uranium Recovery Facility), Nos. 40-9075-MLA/10-898-02-MLA-BD01 (May 20, 2014) at 8 (unpublished).

[68] Vogtle, CLI-12-11, 75 NRC at 529 (quoting AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-13, 67 NRC 396, 400 (2008) and Shieldalloy Metallurgical Corp. (Decommissioning of the Newfield, New Jersey Site), CLI-10-8, 71 NRC 142, 154 (2010)).

Intervenors have advanced only general claims, and so have not demonstrated a virtual certainty of prevailing on the merits. All live contentions in this proceeding will be adjudicated by this Board at the upcoming evidentiary hearing. At that hearing, and in the pre-filed statements of position and testimony, all parties will be afforded the opportunity to present specific and detailed evidence supporting their respective positions to the Board. The Board will then issue its decision based on this presented evidence.

Because the movants have shown neither irreparable injury nor a virtual certainty of prevailing on the merits, the Board will not consider either the harm to other participants or public interest factors.[69]

[69] Vogtle, CLI-12-11, 75 NRC at 529.

V. Board Order

The applications for a stay of the effectiveness of Materials License Number SUA-1534 filed by CI and the Tribe on November 14, 2014 are DENIED.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

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Michael M. Gibson, Chair
ADMINISTRATIVE JUDGE

/RA/

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Dr. Richard E. Wardwell
ADMINISTRATIVE JUDGE

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Brian K. Hajek
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 21, 2015

Board Commentary on Staff Delay

As noted in the above Background statement, in October 2011 this Board brought to the Commission's attention by Memorandum the fact that, having initially estimated that the environmental review of the renewal would be completed by December 2009, the estimated completion date had just become August 2012–a slippage of close to three years.[70] Given that the granted evidentiary hearing on Intervenors' claims of serious harm stemming from mine operations obviously had to await the issuance of the Staff's environment assessment, the Board was concerned that the extreme delay that had already occurred might be impinging upon Intervenors' statutory hearing rights.[71]

Although not sharing that concern, the Commission's response to the Board's Memorandum concluded with this specific direction to the Staff:

> Looking ahead, and given the delays that already have taken place in this proceeding, we expect that 'absent compelling circumstances, the Staff will accord sufficient priority and devote sufficient resources to meeting its current estimated safety and environmental review schedule.'[72]

How did the Staff respond to this directive? Certainly not by making an apparent concerted effort to get the safety and environmental reviews completed by August 2012.

Rather, in sixteen subsequent monthly reports, the Staff announced further slippage in the estimated completion date of the review of the renewal application. And nothing in the explanation for the additional slippage, found in one report after another, suggested any real sense of urgency on the Staff's part in finishing the environmental review. In fact, it was not until October 2014–over two years beyond the date by which the Commission "expected" review completion "absent compelling circumstances"–that the Staff informed the Board and parties

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[70] LBP-11-30, 74 NRC 627, 630 (2011).

[71] Id. at 631.

[72] CLI-12-4, 75 NRC 154, 158 (2012) (quoting Shieldalloy Metallurigical Corp. (Decommissioning of the Newfield, New Jersey Facility), CLI-09-1, 69 NRC 1, 5 (2009)).

that the final environmental review document had surfaced.[73] Ten days later, the mine's operating license was renewed.[74]

Given that time must be accorded the parties to respond with additional filings to the Staff's environmental determinations that undergirded license renewal, the evidentiary hearing now will not take place any earlier than this summer. That will be a full seven years after Intervenors filed their hearing requests challenging the license renewal application. Perhaps of even greater significance, over six and a half years will have elapsed since this Board ruled that Intervenors were entitled to evidentiary consideration of contentions alleging serious harm stemming from continued mine operation.

Still further, with an August 2015 evidentiary hearing,[75] and making allowance for the filing of post-hearing proposed findings of fact and conclusions of law, issuance of the Board's decision is not likely to occur before at least early 2016. Thus, the mine will have continued to operate seven and a half years–perhaps even longer–before Intervenors have received an answer on their claims of harm that were put before this Board in July 2008.

Although the details contained in the foregoing recitation are beyond dispute, one might reasonably ask what useful purpose is served by recounting the history of this proceeding. After all, no part of the years of delay in reaching the merits of the controversy is now recoverable.

The answer lies in the Board's conviction that, irrespective of whether permissible under relevant statutory and regulatory provisions (an issue we need not address here), what has happened to date in this proceeding threatens the public perception of the integrity of the

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[73] Environmental Assessment Availability Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Oct. 27, 2014).

[74] License Renewal Notification, Letter from Marcia Simon, NRC Staff Counsel, to Administrative Judges and Parties (Nov. 6, 2014).

[75] The week of August 24, 2015 was set for the evidentiary hearing after consultation with all parties. Tr. at 586–7.

agency's adjudicatory process at substantial potential cost to the reputation of this agency. Can there be the slightest doubt how a disinterested observer of the passing scene would look upon a process that, after an independent adjudicatory board has granted a hearing request challenging the issuance of a particular license by the agency's regulatory staff, permits the staff both (1) to preclude for many years by its own inaction the conduct of the hearing and then (2) to issue the license before the hearing has taken place. Simply posing the question, we submit, provides the answer to it.

Atomic Safety and Licensing Boards are charged with the responsibility of conducting adjudicatory proceedings in a manner that leaves no room for questioning the integrity of those proceedings. That said, these boards are currently without the authority to prevent a repetition in some future proceeding of what has occurred here.

In the final analysis, when the evidentiary hearing takes place is largely controlled, not by the presiding tribunal, but by the Staff. This is because, as a practical matter, the hearing cannot take place until the Staff has completed its environmental review of the particular license application, a review that is not subject to board superintendence. The board can require the submission of periodic Staff status reports (as was done in this matter), but that is all.

We should not be understood as requesting the Commission now to empower its licensing boards to supervise the conduct of Staff environmental reviews. In our view at least, the boards are ill-equipped to assume such an additional task; one that, in any event, seems inappropriate for assumption by a strictly adjudicatory tribunal. What we are suggesting is that, given what has transpired in this case, the Commission might see fit to make it clear to the Staff that future environmental reviews of other license applications, at least ones that likewise involve relatively minimal complexity, need to be conducted considerably more expeditiously. Such an expectation seems particularly compelling in circumstances where, as here, the possessor of an expired materials license is being allowed to continue activity under that license while the objections to its renewal are being adjudicated. It appears to the Board that the Staff

attached no weight to that consideration when conducting the review of this license renewal application.

APPENDIX

Summary of Monthly Status Reports

NRC Staff Status Report Due	Predicted Date of Issuance of the EA	Staff Explanation for Delay	Cumulative Delay
January 2009	December 2009	-	-
June 2009	February 2010	Delays in receiving responses to Staff's requests for additional information.	2 months
October 2009	May 2010	None.	5 months
February 2010	June 2010	Necessity of having to reschedule public meetings.	6 months
May 2010	July 2010	None.	7 months
June 2010	November 2010	None.	11 months
November 2010	December 2010	None.	12 months
December 2010	April 2011	None.	16 months
January 2011	June 2011	None.	18 months
March 2011	August 2011	None.	20 months
April 2011	December 2011	Need to consult with the Tribes to identify historic properties under Section 106 of the National Historic Preservation Act.	24 months
October 2011	August 2012	Identification of historic properties taking significantly longer than previously anticipated. "Staff recently requested that the Applicant compile and proffer information regarding the identity and location of traditional cultural properties that could potentially be affected by the proposed project . . . Staff expects to receive the requested information from the Applicant by May 2012."	32 months
March 2012	August 2012	Noting a possibility of delay (up to six months) due to time potentially needed to accomplish National Historic Preservation Act section 106 duties.	32 months
April 2012	October 2012	Delays on the Safety Evaluation Report will in turn delay the environmental review document.	34 months
May 2012	November 2012	Delay in estimated issuance of Safety Evaluation Report results in delay of the environmental review document.	35 months
August 2012	December 2012	Delay in estimated issuance of Safety Evaluation Report results in delay of the environmental review document.	36 months

October 2012	March 2013	Delay associated with National Historic Preservation Act Section 106 duties.	39 months
February 2013	April 2013	Noting possibility of further delay due to the complicated nature of the National Historic Preservation Act Section 106 consultation activities.	40 months
April 2013	June 2013	Extra time needed to accomplish the National Historic Preservation Act Section 106 consultation activities.	42 months
June 2013	August 2013	Sufficient time needed for meaningful review and comment by the consulting parties regarding information obtained by the Staff in furtherance of its National Historic Preservation Act Section 106 obligations.	44 months
August 2013	October 2013	Sufficient time needed for meaningful review and comment by the consulting parties regarding information obtained by the Staff in furtherance of its National Historic Preservation Act Section 106 obligations.	46 months
September 2013	November 2013	Developing and promulgating relevant information for public consumption and comment taken longer than Staff initially anticipated.	47 months
November 2013	December 2013	Variety of factors, including delay imposed by the partial government shutdown.	48 months
December 2013	February 2014	Variety of complicating factors, including the finalization and documentation of the Staff's conclusions with respect to Section 106 of the National Historic Preservation Act.	50 months
January 2014	March 2014	Variety of factors, including the finalization and documentation of the Staff's conclusions with respect to Section 106 of the National Historic Preservation Act.	51 months
March 2014	April 2014	None.	52 months
April 2014	May 2014	Request from State of Nebraska for additional time to review draft document.	53 months
May 2014	June 2014	Continuing to revise.	54 months
June 2014	August 2014	Continuing to revise.	56 months
July 2014	September 2014	Continuing to revise.	57 months
September 2014	October 2014	None.	58 months

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-OLA
	)	
In-Situ Leach Uranium Recovery Facility, Crawford, Nebraska	)	
	)	
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Applications for Stay of Source Materials License SUA-1534) (LBP-15-2)** have been served upon the following persons by Electronic Information Exchange, and by electronic mail as indicated by an asterisk.

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[Original signed by Clara Sola]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 21st day of January, 2015