UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION

CLI-15- _____

In the Matter of	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES INC.	)	ASLBP No. 08-867-02-0LA-BD01
	)	
(License Renewal for the	)	February 16, 2015
In Situ Leach Facility, Crawford, Nebraska)	)	

PETITION FOR REVIEW

Pursuant to 10 CFR 2.1212, the Oglala Sioux Tribe hereby submits to the Nuclear Regulatory Commission this Petition for Review of the Memorandum and Order of the Atomic Safety and Licensing Board entered on January 21, 2015, denying the applications for stay of the issuance of the renewal of Source Materials License SUA-1600 (the "License"). This Petition is timely filed in accordance with 10 CFR 2.341(b)(1).

I. Summary of the Decision or Action of Which Review Is Sought

This matter involves the Application of Crow Butte Resources, Inc. ("CBR") for renewal of a 10-year Source Materials License SUA-1534 ("License") submitted to the Commission by CBR on November 27, 2007, for its in situ uranium leach facility south of Crawford, Nebraska, on approximately 3,300 acres of private, federal, state, and local public lands. The facility includes leach fields and a Central Processing Facility ("CPF").[1] In 2008, the Oglala Sioux Tribe ("OST" or "Tribe") and Consolidator Intervenors ("CI") then initiated these proceedings challenging the renewal of the

[1] ADAMS Accession Nos. ML073480266, ML073480272, ML073480274, ML073480267.
[2] 79 F.Reg. 64629-31 (October 30, 2014); ADAMS Accession No. ML14288A517.

License.

The original License was issued on December 29, 1989 and renewed once thereafter. CBR stated that production from these original leach fields was projected to end in late 2014 or within a short period thereafter followed by restoration to be fully completed by 2023.

On June 30, 2007, CBR submitted its pending application for a 2,100 acre satellite "North Trend" expansion area located approximately 2 miles northwest of the CPF, on May 16 and June 8, 2012 submitted its pending application for the approximately 5,000 acre satellite "Marsland" expansion area approximately 11 miles southeast of the CPF, and on August 3, 2010, submitted its application for the "Three Crow" expansion area, a satellite facility located about 5 miles west of the CPF to support the main facility, with the satellite facilities to be connected by pipelines to transfer source material in solution.

On October 30, 2014, the NRC Staff issued the "Final Environmental Assessment" ("EA") upon the CBR License Renewal Application with a finding of no significant environmental impact ("FONSI") and that the preparation of an Environmental Impact Statement ("EIS") was therefore not required.[2] Over the 7-year period it took for the NRC Staff to prepare and issue the EA, which was first set to be issued in January 2009, no public scoping meetings or hearings were held on the EA and no "draft" EA was issued. On January 5, 2014, pursuant to order of the Board, the Oglala Sioux Tribe ("OST" or "Tribe") and Consolidate Intervenors ("CI"), parties to this renewal adjudicatory proceeding, submitted 14 new contentions arising from the EA in

[2] 79 F.Reg. 64629-31 (October 30, 2014); ADAMS Accession No. ML14288A517.

addition to the contentions that had already been admitted by the Board.[3] The Board has set an evidentiary hearing upon all admitted contentions for August 24, 2015.[4]

On November 5, 2014, less than a week following the issuance of the EA by the NRC Staff and while the adjudication over the License Renewal Application was and is pending and set for evidentiary hearing, the NRC Staff on behalf of the Commission approved the Application and issued the License renewal for the CBR Crow Butte facility.[5] The License was issued with an expiration date of November 5, 2014.[6] The NRC Staff in its notice to the Board and the parties of the License renewal stated pursuant to 10 C.F.R. 2.1202(a) that it found as its reasons for the issuance of the License while a hearing is pending:

> [T]hat the Application complied with the Atomic Energy Act and the NRC's regulations. More specifically, the Staff finds that CBR's application meets all applicable requirements in 10 C.F.R. Parts 20 and 40. In particular, under § 40.32(b) the Staff finds that CBR is qualified by reason of its training and experience to use source material for its requested purpose. Under § 40.32(c), the Staff finds that the equipment and procedures CBR proposes to use at the Crow Butte facility are adequate to protect the public health and minimize danger to life or property.
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> Based on these findings and the specific analysis in its Safety Evaluation Report under § 40.32(d) the Staff finds that issuing a renewed license to CBR is not inimical to either the public health and safety or common defense and security. The pending hearing before the Board does not affect these conclusions. The Staff has considered the safety-related arguments raised by the intervenors in the hearing, but those arguments do not affect the conclusions in the Safety Evaluation Report.[7]

On November 14, 2014, the Tribe and CI pursuant to 10 CFR 2.1213 each moved

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[3] ADAMS Accession Nos. ML15005A541 and ML15006A274, respectively.
[4] ADAMS Accession No. ML15010A043 (page 587).
[5] ADAMS Accession No. ML13324A101.
[6] *Id*.
[7] ADAMS Accession No. ML14310A434 (NRC Staff Letter to Board re Issuance of License).

to stay the issuance of the License contending that the issuance of the License was premature and unwarranted.[8] The Board heard oral arguments from the parties[9] and on January 21, 2015, issued its Memorandum and Order denying the applications for stay of the License.[10] In addition to its rulings upon the applications for stay, the Board issued separate commentary on the NRC Staff delay in preparing and issuing the EA.[11] In its Memorandum and Order, the Board found that although "harm to tribal cultural resources does constitute irreparable injury," a pending contention of the Tribe and CI, the allegations "lacked the specificity and sufficient details needed to demonstrate serious, immediate, and irreparable harm to cultural and historic resources" required to support a stay.[12] Similarly, the Board ruled that the Intervenors' claims of contamination of ground and surface water lacked "the requisite specificity that Crow Butte's mining poses either imminent or certain harm to the health of Tribe members" to support a stay.[13] The Board further found that granting the stay "…would not prevent these injuries from continuing. The company could still continue to operate the mine under the agency's timely renewal provision."[14]

The Tribe and CI further argued to the Board that the issuance of the License materially changed the nature of the proceeding as it became a "vested interest in Crow Butte" subject to different procedures and burdens, and that "the issuance of the License leaves the involved parties no longer believing that this proceeding has any integrity or

[8] ADAMS Accession Nos. ML14321A186 and ML14321A185 respectively.
[9] ADAMS Accession No. ML14357A585 (transcript of oral arguments).
[10] ADAMS Accession No. ML15021A246.
[11] *Id*. at 15-20.
[12] *Id*. at 10.
[13] *Id.* at 10-11.
[14] *Id*. at 12 (citing 10 C.F.R. 40.42(a).

due process backbone. …[T]hat it is a sham because their voice has not been heard and they have been squelched. …The perception is that this is a done deal."[15] The Board responded that that the burden has not shifted as a result of the issuance of the License and the EA.[16]

II. Statement Where the Matters of Fact or Law Were Raised Below

As the Board notes in its Memorandum and Order discussed above, the issues of (1) the premature issuance of the License as violations of NRC rules, NEPA, and due process, (2) the denial of the procedural right of public participation prior to a decision upon the License Application, (3) the failure of the Commission to make a decision upon the License Application informed by public participation, (4) the apparent bias of the proceedings and the Commission as a result, (5) the harm from the 7-year delay by the NRC Staff in issuing the EA, and (6) the shifting of burden, were each raised by the Intervenors to the Board in the proceedings below[17] and, in regards to the 7-year NRC Staff delay in the issuance of the EA, by the Board itself.[18]

III. Statement Why the Board's Decision is Erroneous

The Board decision denying the applications for stay is erroneous as matters of law. First, the Board accepted the NRC Staff's assertion that it was obligated to issue the License under 10 C.F.R. 2.1202 (a) which states in relevant part:

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[15] *Id*. at 11; Tr. At 546-47, 550-52.
[16] *Id.* at 11 n. 63.
[17] *Supra*, Notes 8, 9, 10, 15; *see also*, Tr. 518-519, 524-531, 534-536, 538, 542-543, 547-548, 558-560 (premature / prior to receiving public comment / consultation, due process, Administrative Procedures Act (arbitrary, capricious, and unreasonable), 10 C.F.R. 2.1202); Tr. 531-533, 546-547, 550 (changing of procedure and shifting of burden); Tr. 551-552 (apparently bias / harm from the delay).
[18] *Supra*, Note 11.

> During the pendency of any hearing under this subpart, consistent with the NRC staff's findings in its review of the application or matter which is the subject of the hearing *and* ***as authorized by law***, the NRC staff *is expected to promptly issue its approval or denial of the application,* ***or take other appropriate action*** *on the underlying regulatory matter for which a hearing was provided*. When the NRC staff takes its action, it must notify the presiding officer and the parties to the proceeding of its action. That notice must include the NRC staff's *explanation why the public health and safety is protected and why the action is in accord with the common defense and security despite the pendency of the contested matter before the presiding officer.* The NRC staff's action on the matter is effective upon issuance by the staff, ***except*** in matters involving:
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> (1) An application to construct and/or operate a production or utilization facility ….

(emphasis supplied).

The Tribe responded by noting that this regulatory provision does not *require* the NRC Staff to actually issue a license even if the application is approved prior to receiving submissions from the public and at the evidentiary hearing on the license application and does not require approval, particularly when not "authorized by law" or when "other appropriate action" - such as making the decision to wait a relatively short period for the public submissions and hearing on the admitted contentions because that, rather than premature issuance of the License, would provide for the submission of and consideration of additional evidence and information from the public and parties which would better insure the protection of the public health and safety from the risks of surface and groundwater contamination as well as the harm to various historic, cultural, and spiritual interests integral to the "health" and safety of the Oglala Lakota peoples, who are also members of the "public." The Tribe also responded by noting that the Crow Butte facility fell within an explicit exception to this subsection which expressly excludes from

its effect the "operation" of a "production facility." 10 C.F.R. 2.1202(a)(1). The Crow Butte License is for the operation of a uranium source material "production facility" and by the clear language of the regulation would be excluded from the effect of Subsection 2.1202(a) as a matter of law.

Although the Board members questioned the purported urgency[19] of the NRC Staff to act after a 7-year delay[20] on the License Application and repeatedly characterized as "bizarre"[21] this first-the-verdict, then-the-trial Alice in Wonderland position[22] of the NRC Staff that it was obligated to issue the License without waiting for the completion of the very proceedings on the License Application, it failed to overrule the NRC Staff's action.

The Board's decision was further in error as matters of law in regards to the implications of the interplay between the License Application it was acting on following the issuance of the EA and its obligations under the National Environmental Policy Act ("NEPA") as well as on the issue of injury. The NEPA regulations command that:

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[19] The 7-year delay clearly undermines the NRC Staff's assertions that it was compelled to act on the License Application when it did due the subsection's requirement that it act "promptly."

[20] Tr. 517, 518 ("what's the big rush [after 6 years]?")

[21] Tr. 526, 527, 529, 534. Significantly, when asked repeatedly, the NRC Staff could not cite to even one other instance where it had issued a license when an evidentiary hearing was pending on contentions. *Id*.

[22] 'Let the jury consider their verdict,' the King said,
for about the twentieth time that day.
'No, no!' said the Queen. 'Sentence first – verdict afterwards.'
'Stuff and nonsense!' said Alice loudly. 'The idea of having the sentence first!'
'Hold your tongue!' said the Queen, turning purple.
'I won't! said Alice.
'Off with her head!' the Queen shouted at the top of her voice.
Lewis Carroll, Alice's Adventures in Wonderland, Chapter XII (1865); *see also, Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000).

> …agencies shall not undertake in the interim [while the environmental review process is in progress] any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:
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> (1) Is justified independently of the program;
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> (2) Is itself accompanied by an adequate environmental impact statement; *and*
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> (3) *Will not prejudice the ultimate decision on the program.* ***Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.***

40 C.F.R. 1506.1(c) (emphasis provided). As Justice Marshall opined in *New York v. Kleppe*, 429 U.S. 1307, 97 S.Ct. 4, 6-7 (1976): "It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an irreversible commitment of resources, a citizen's right to have environmental factors taken into account by the decisionmaker would be irreparably impaired." The twin purposes of NEPA are to ensure "that federal agencies are informed of environmental consequences *before* making decisions and that the information is available to the public." *Citizens for Better Forestry v. US Dept. of Ag.*, 341 F.3d 961, 970-71 (9th Cir. 2003) (emphasis supplied). 40 C.F.R. 1500.1 provides, in relevant part: "NEPA procedures must insure that environmental information is available to public officials and citizens *before* decisions are made *and before actions are taken*." (emphasis supplied) "NEPA ensures that [an] agency will not act on incomplete information." *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 371 (1989); *also, Ohio Valley Environmental Coalition v. US Army Corps of Engrs.*, 674 F.Supp.2d 783, 792 (S.D.W.Va. 2010).

More specifically in regards to the matter before the Commission, the *very* purpose of an Environmental Assessment is to provide the decisionmaker the information needed to decide whether or not an environmental impact statement is needed. *Id*.;

Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000); 40 C.F.R. 1508.9. Obviously, the decisionmaker cannot make a properly "informed" decision prior to completing the NEPA process and receiving submissions from the public and parties. Here, there were no public scoping meetings, no sharing of a "draft" EA on the License Renewal with the public or the parties for comment. The issuing a FONSI in a manner that forecloses any comments on the EA or on any of the pending contentions or upon any information and evidence from the hearing set for August on the License Renewal, prejudges not only the FONSI but the issuance of the License itself and is and should be impermissible. *See, Davis v. Mineta*, 302 F.3d 1104, 1112-13 (10th Cir. 2002); *Pit River Tribe v. U.S.F.S.*, 469 F.3d 768, 786-87 (9th Cir. 2006) (licenses issued prior to completion of NEPA process) ("Similarly an agency does not satisfy NEPA by ignoring the statute at a critical stage, committing resources to development, and eventually completing an EIS – however lengthy and exhaustive – that simply asserts that the fundamental decision to develop has already been made."), *see also, Ohio Valley*, 674 F.Supp.2d 783. (FONSI attached to issuance of permit found to foreclose public involvement and violate NEPA). The issuance of the License to CBR by the NRC Staff before the public had any opportunity to present evidence on the License Application at the hearing or comment on the EA violated the heart and sole of NEPA and the proper reading of subsection 2.1202(a) rendering the issuance of the License a violation of law and the Board's affirmance of that conduct clearly erroneous.

Under NEPA, the timing of the environmental review is key not only to efficiency of the operation of the agency but also to the integrity of the decision-making. *Metcalf*, 214 F.3d at 1142-43. An extended delay in the review – such as the "bizarre" 7-year

delay here - undermines the integrity of both the process and the ultimate decision. As the court stated in *Pit River Tribe*, "dilatory or ex post facto environmental review cannot cure an initial failure to undertake environmental review. …The rational behind this rule is that inflexibility may occur if delay in preparing an EIS is allowed: After major investment of both time and money, it is likely that more environmental harm will be tolerated." *Pit River Tribe v. U.S.F.S.*, 469 F.3d at 786; *see also, Metcalf v. Daly*, 214 F.3d at 1144 (noting the longer an agency worked with an applicant, the greater the pressure to approve the application). "The 'hard look' mandated by Congress must be timely, and must be taken in good faith – not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Montana Wilderness Ass'n v. Fry*, 310 F.Supp.2d 1127, 1143 (D.Mont. 2004) (citing *Metcalf*). Thus, the Tribe and Consolidate Intervenors will head into the hearings in August not only with the "final" agency act already made, the issuance of the License, but also with an over 7-year delay in the completion of the environmental and licensing proceedings. This apparent bias and prejudice is in itself another violation of NEPA that renders the NRC Staff's issuance of the License to CBR unlawful.

40 C.F.R. 1501.4 mandates that agencies "involve environmental agencies, applicants, *and the public, to the greatest extent practicable, in preparing assessments.*" (emphasis added) 40 C.F.R. 1506.6 requires that agencies "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." The making of the decision to issue the License to CBR not only violated NEPA's requirement that such decisions be fully informed by public participation, but it also violated the public's, including the parties, rights to participate. *Ohio Valley*, 674 F.Supp.2d at 792 ("public

involvement is critical to NEPA's function"); *Pa'ina Hawaii, LLC* (Materials License Application), CLI-10-18, Nuclear Reg. Rep. P 31621 (N.R.C.), 2010 WL 2753784 (2010). As the court noted in *Metcalf*, the timing and public participation requirements of NEPA are intended in part to mitigate potential agency bias by insuring that "there is no way the decision-maker can fail to note the facts and understand the very serious arguments advanced by the [parties]…." *Metcalf*, 214 F.3d at 1142.

In finding that providing an EA comment period "is consistent with the public participation goals of NEPA," the Commission in *Pa'ina* remarked: "An agency when preparing an EA, must provide the public with sufficient environmental information, considered in the totality of circumstances, to permit members of the public to weigh in with their views and thus inform the agency decision-making process." *Pa'ina Hawaii*, at *20 (the NRC Staff agreed to provide a public comment period with at least one public meeting on a draft EA prior to a FONSI finding); *accord.*, *Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002) ("[t]he public must be given an opportunity to comment on draft EAs and EISs."); *also*, *Citizens for Better Forestry*, 341 F.3d at 970. The failure to provide the parties or the public with any opportunity to comment prior to the issuance of the FONSI was a clear violation of NEPA that requires the reversal of the issuance of the License.

The Board also found and held that the Tribe and Consolidated Intervenors had failed to demonstrate sufficient injury to support the applications for the stay of the issuance of the License renewal. Despite the assertions of the Tribe and CI of procedural and due process violations, and general assertions of harm to cultural and environmental interests, the Board insisted that the moving parties prove up their harm before they've

even had an opportunity to develop the evidence for the hearing in August on those same interests. However, even so, the procedural and due process violations were sufficient. NEPA is a "purely procedural" statute focused on informed decision making such, *Methow Valley*, 490 U.S. at 350, such that "agency action taken without observance of the procedure required by law will be set aside." *Metcalf*, 214 F.3d at 1141; *also*, *Davis*, 302 F.3d at 1112 (a violation of NEPA procedure results by law in a "clear error of judgment").

Thus, under NEPA, the public and the parties have vested procedural rights. As the U.S. Supreme Court stated in *Massachusetts v. E.P.A.*, 549 U.S. 497, 518 (2007): "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the request relief will prompt an injury-causing party to reconsider the decision that allegedly harmed the litigant." Thus, "[a]ll that is necessary is to show that the procedural step was connected to the result. …[A party] seeking to vindicate a procedural right need not demonstrate that the exercise of such right will change an agency's ultimate decision. Instead, the [party] need only show (1) that a procedural error occurred, and (2) that some procedural remedy exists." *Ohio Valley*, 674 F.Supp.2d at 799. Congress has presumptively determined that the failure to comply with NEPA has detrimental consequences for the environment." *Davis*, 302 F.3d at 1114-15 (citing 42 U.S.C. § 4321 and *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) ("The injury of an increased risk of harm due to an agency's uninformed decision is precisely the type of injury the National Environmental Policy Act was designed to prevent.")). As concluded in *Davis*: "For these reasons, we hold the harm to the environment may be presumed when an agency fails to comply with the required

NEPA procedure." *Davis*, 302 F.3d at 1115.

Here, the Tribe and Consolidated Intervenors along with the public have vested procedural rights under NEPA to have the agency follow the procedures that ensure the public is fully informed by the agency about the activities under consideration as well as the agency process and deliberations, that ensure a full opportunity for public participation and comment prior to the agency action on the License application, that ensure an informed decisionmaker having the benefit of the information and evidence provided by the parties and the public, and that ensure a timely and proper decision under conditions that promote fairness and objectivity rather than prejudgment and bias. The violation of those rights by the NRC Staff and the Board invokes the statutory presumption of harm to the environment and to the Tribe and Consolidated Intervenors.

Furthermore, the continuing production and sale of uranium is an irretrievable commitment of natural resources. *Montana Wilderness*, 310 F.Supp.2d at 1145. An issue directly related to this harm is the setting by the NRC Staff of the term of the License as running from the date of issuance, November 5, 2014, rather than from the expiration of the date of its previous license – in other words, the NRC Staff effectively issued CBR a 17-year license rather than the 10-year license envisioned by NRC regulations and procedures. This also is an unauthorized act by the NRC Staff in violation of law that invalidates the License.

Finally, much was made of the fact that the facility would still continue to operate under its application even if the issuance of the License were reversed, and that, therefore, the harm to the Tribe and Consolidated Intervenors would be the same either

way. As argued to the Board by the Tribe, the issuance of the License creates a "vested" interest in CBR that carries with it the right to continue to develop its discovered resource. *Pit River Tribe*, 469 F.3d at 773, 777-78. It can then only be revoked for cause pursuant to 10 C.F.R. Subpart B. This severely prejudices the NEPA review.

IV. Conclusion

For these reasons, the Commission should grant the Tribe's petition for review.

Respectfully Submitted,

Signed (electronically) by Andrew B. Reid

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Dated: February 16, 2015, Denver, Colorado.

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305 (as revised), I certify that, on this date, copies of the foregoing were served upon the Electronic Information Exchange (the

NRC's E-Filing System), in the above-captioned proceeding.

Dated: February 16, 2015.

Signed (electronically) by Andrew B. Reid

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