

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

In the Matter of)	Docket No. 40-8943
)	ASLBP No. 08-867-02-0LA-BD01
CROW BUTTE RESOURCES INC.)	
)	
(License Renewal for the)	July 28, 2015
In Situ Leach Facility, Crawford, Nebraska))	

**OGLALA SIOUX TRIBE’S MOTION
TO CALL CONTENTION 1 WITNESS OUT OF ORDER,
OR, ALTERNATIVELY, TO RESET CONTENTION 1**

Pursuant to 10 CFR 2.323, 2.324, and 2.334(b), the Oglala Sioux Tribe (“OST”) hereby submits this motion to have Consolidated Intervenor / OST Contention 1 expert witness, Dr. Louis Redmond, testify on July 24, 2015.

I. Consultation

Counsel for OST certifies that he consulted with the other parties to this proceeding and states that Consolidated Intervenor (“CI”) do not oppose the relief requested by this motion. The NRC Staff opposes calling Dr. Redmond out of order as the first witness on the first day of the evidentiary hearing, August 24, 2015, but does not oppose moving Contention 1 to the first day of the evidentiary hearing and having Dr. Redmond set as the first witness. Crow Butte Resources, Inc. (“Crow Butte”) opposes calling Dr. Redmond out of order as the first witness on August 24, 2015, but does not oppose moving all of the CI/OST Contention 1 witnesses to the first day of the evidentiary hearing and having Dr. Redmond set as the first witness followed by the other CI / OST Contention 1 witnesses while leaving the NRC Staff and Crow Butte witnesses to testify at the end of the evidentiary hearing on August 27 and 28, 2015. OST and NRC Staff are opposed to Crow Butte’s proposal of splitting the panels, the parties’ Contention 1

witnesses, to different days.

II. Motion

As stated to the Board by counsel for CI and OST, Dr. Louis Redmond, their primary witness on the sufficiency of the cultural / historic resource surveys of the Crow Butte facility and area, is unable to appear to testify in regards to Contention 1 on August 25 through August 28, 2015, due to a prior conflicting commitment. August 24, 2015, is the only day he is available to testify. As stated by Dr. Redmond:

In order to make it back there and get settled in for the family, we would be leaving mid-day on the 25th or very early on the 26th. For those who pay attention to the tribal thing, this young man is “Mitunkska” he is of the blood of my brother and my father, his two sons are the only ones who carry the name of my father directly. Should someone like to interpret this for someone, I will not interfere with this ceremony, family reunion, family gathering, etc in any way. To me it is very close to sacred. Possibly someone at the tribe might be able to explain what this matter means within the greater realm of the tiyospaye to some of the folks involved in this.

OST merely requests that Dr. Redmond, who is largely donating his time and expertise due to the limited resources of CI and OST, be accommodated by simply allowing him to be the first witness so that he can leave to attend to this sacred commitment. The presentations of OST and CI, and the interests of the general public and the Lakota peoples, will be severely prejudiced without his participation in this proceeding. Pursuant to the rules and procedures of the Board, Dr. Redmond’s written testimony has already been provided to the Board and all parties and proposed questions to him have also already been submitted to the Board and all parties. All parties therefore have the opportunity to be fully prepared as to Dr. Redmond’s testimony and there is absolutely no opportunity for any surprise. No party would be prejudiced at all by allowing Dr. Redmond to be the first witness on August 24, 2015, and the fairness of the

proceedings, the agency's compliance with NEPA, NHPA, APA and other controlling law, and the interests of the general public and the Lakota peoples, would be promoted.

Frankly, particularly under these circumstances of prior written submission of the testimony and proposed questions of all witnesses, OST counsel is shocked at the positions taken by Crow Butte and NRC Staff to this request. Court's and agency tribunals have broad discretion in setting the order of witnesses and presentation of evidence. The Board's rule, 10 C.F.R. 2.324, authorized the presiding officer or the Commission to designate the order of procedure at a hearing. Permitting witnesses, including expert witnesses, to testify out of order to accommodate the witness's conflicts in schedule are extremely common, almost routine, when based on good cause. *See re federal administrative evidentiary hearings, e.g., In the Matter of Certain Electronic Devices*, 2013 WL 3122939, *3 (US Intern. Trade Com'n 2013) (granted request, over opposing party's objections, to call witnesses out of order to accommodate their travel needs rather than resetting date for hearing); *In the Matter of Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, 2008 WL 291496 (US Intern. Trade Com'n 2008) (expert witness permitted to testify out of order, over objection of other party, to accommodate travel schedule); *Vitas Healthcare Corp. of Calif. v. Health Care Financing Admin.*, 2001 WL 1172246, fnt 4 ("The taking of testimony 'out of order' is a frequent occurrence at HHS administrative hearings."); *In the Matter of Certain Recombinantly Produced Human Growth Hormones*, 1994 WL 930101, *3 (US Intern. Trade Com'n 1994) (agency tribunal favored motion to call witnesses out of time to accommodate witnesses' religious commitments).

As noted by the Board during the prehearing scheduling conference held on July 27, 2015, moving Contention 1 from August 27 and 28 to August 24, 2015, would result in the

pushing back of all of the other contentions and the witness testimony on each of those contentions, and run the risk of creating scheduling conflicts for other witnesses and prejudicing other parties and this proceeding. OST would like to avoid that risk if possible. Merely resetting Dr. Redmond's testimony for August 24, 2015, would wholly avoid that risk without prejudicing any party.

The parties have already provided tentative notice to their witnesses of the tentative schedule set by the Board for the order of contentions and the presentation of witnesses and evidence, and the witnesses of the parties have been planning and making travel plans accordingly. Moving one or all of the witness "panels" of the parties on Contention 1 to August 24, 2015, and then rescheduling all other contentions and witnesses to later days, as proposed by Crow Butte and NRC Staff, fully invokes that risk of other conflict and prejudice. It should be a no brainer. However, alternatively, if the Board determines that the only way to accommodate Dr. Redmond is to move Contention 1 or all of the CI / OST Contention 1 witnesses to August 24 and August 25, 2015, then OST would prefer that to not having Dr. Redmond's testimony at all.

For all the foregoing reasons, OST requests that the Board issue an order permitting Dr. Louis Redmond to be called out of order as the first witness on August 24, 2015, or, alternatively, that Content 1 or CI / OST's Contention 1 witnesses be reset for August 24 and 25, 2015, and the other contentions and witnesses and presentation of evidence by the parties thereon be rescheduled accordingly.

Respectfully Submitted,

Signed (electronically) by Andrew B. Reid

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Dated: July 28, 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 **OGLALA SIOUX TRIBE'S MOTION TO CALL CONTENTION 1 WITNESS OUT OF ORDER, OR, ALTERNATIVELY, TO RESET CONTENTION 1** were served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding.

Dated: July 28, 2015.

Signed (electronically) by Andrew B. Reid

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