

## **BEFORE THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

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In the Matter of: License Amendment 7:  
Radioactive Material License Number UT  
1900479 (Dawn Mining Alternate Feed  
Amendment Request)  
July 10, 2014  
Energy Fuels Resources (USA) Inc.  
White Mesa Mill

### **PETITION TO INTERVENE IN SUPPORT OF REQUEST FOR AGENCY ACTION**

August 11, 2014

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### **PETITION TO INTERVENE IN SUPPORT OF REQUEST FOR AGENCY ACTION**

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Pursuant to Utah Code Ann. § 63G-4-207, Utah Code Ann. §§ 19-1-301.5(4), (7)(c)(ii), and Utah Admin. Code R305-7-204, the Ute Mountain Ute Tribe (“Tribe”) files this Petition to Intervene demonstrating sufficient facts to establish its right to bring its Request for Agency Action contesting the Utah Division of Radiation Control’s (“DRC”) decision approving the July 10, 2014 *License Amendment 7: Radioactive Material License Number UT 1900479* (also referred to as the Dawn Mining Alternate Feed Amendment Request) (“License Amendment 7”).

#### **I. AGENCY’S FILE NUMBER OR OTHER REFERENCE NUMBER AND NAME OF PROCEEDING**

The Tribe seeks to intervene related to the approval of License Amendment 7 (to Radioactive Material License Number UT 1900479). This Petition to Intervene is timely filed with Rusty Lundberg, DRC Director, pursuant to Utah Admin. Code R305-7-204(2)(b).

**II. STATEMENT OF FACTS DEMONSTRATING THAT THE TRIBE HAS LEGAL INTERESTS SUBSTANTIALLY AFFECTED BY LICENSE AMENDMENT 7 AND THAT THE TRIBE IS QUALIFIED TO INTERVENE RELATED TO LICENSE AMENDMENT 7**

**A. INTRODUCTION**

Utah Code Ann. § 63G-4-207(1)(c) and Utah Admin. Code R305-7-204(1)(a) require a person who wishes to intervene in a formal adjudicative proceeding to file a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding or that the petitioner qualifies as an intervenor under any provision of law. *See also* Utah Code Ann. § 19-1-301.5(7)(c)(ii) (requiring that the petitioner demonstrate that the petitioner's legal interests may be substantially affected by the permit review adjudicative proceeding and that the interests of justice and the orderly and prompt conduct of the permit review adjudicative proceeding will not be materially impaired by allowing the intervention). Utah Code Ann. § 19-1-301.5(7)(c)(ii)(C) and Utah Admin. Code R305-7-204(1)(a) also require that the petitioner's request for agency action raise issues or arguments preserved in accordance with Utah Code Ann. §§ 19-1-301.5(4) (which requires that the petitioner has provided sufficient public comments to preserve the right to intervene or contest an agency order).

To demonstrate that the Tribe is entitled to file the accompanying Request for Agency Action, the Tribe will demonstrate that: (1) the Tribe has legal interests that are substantially affected by the DRC's agency action on License Amendment 7, as evidenced by the facts and by the Tribe demonstrating that it can establish both traditional standing and alternative standing under Utah case law; (2) the interests of justice and the orderly and prompt conduct of the permit review adjudicative proceeding will not be materially impaired by allowing the proposed intervention; and (3) the Tribe properly preserved its right to intervene by timely filing public

comments on License Amendment 7 and by consistently filing public comments in every available DRC forum to provide the DRC sufficient information to fully consider the substance and significance of the Tribal concerns.

**B. THE TRIBE HAS LEGAL INTERESTS THAT ARE SUBSTANTIALLY AFFECTED BY THE DRC'S AGENCY ACTION APPROVING LICENSE AMENDMENT 7**

**1. STATEMENT OF FACTS DEMONSTRATING IMPORTANT LEGAL INTERESTS**

The Ute Mountain Ute Tribe is a federally-recognized Indian tribe with lands located in southwestern Colorado, northwestern New Mexico, and southeast Utah. There are two Tribal communities on the Ute Mountain Ute Reservation: Towaoc, in southwestern Colorado, and White Mesa, which is located in Utah within three miles of the White Mesa Mill (“WMM”) facility. The lands comprising the White Mesa community are held in trust for the Tribe and for other individual Tribal member owners. The Tribe has jurisdiction (as a federally-recognized tribal government) over Tribally-owned lands, Tribal member-owned lands, and members of the Ute Mountain Ute Tribe who live in the White Mesa community. Under the Tribe’s Constitution, the Tribal Council is responsible for, among other things, the management and protection of Tribal lands and for the protection of public peace, safety, and welfare.

Ute Mountain Ute Tribal Members (“UMU Tribal Members”) have lived on and around White Mesa for centuries and intend to do so forever. The community of White Mesa depends on groundwater resources buried deep in the Navajo aquifer for its municipal (domestic) needs. UMU Tribal members also make use of the perched (shallow) aquifer near the WMM facility and near the White Mesa Community for drinking and ceremonial use as well as indirect uses through livestock watering and the harvesting of wildlife and plants. UMU Tribal Members

continue traditional practices, which include hunting and gathering and using the land, plants, wildlife and water in ways that are integral to their culture.

The White Mesa Tribal community is located approximately three miles south of the WMM facility. The WMM is located on Ute aboriginal lands, and its upgradient location from the Tribal community means that contamination from WMM facility operations generally flows through ground and surface water towards the Tribal community. The Tribe has a strong interest in maintaining the long-term quality of land and natural resources and preventing short-term users like Energy Fuels Resources (USA) Inc. (“EFRI”) from polluting Tribal lands, members, and resources and making aboriginal and Tribal lands uninhabitable for future generations of Tribal members.

The Tribe’s legal interests in protecting Tribally-owned lands, Tribal member owned lands, and the public peace, safety, and welfare of UMU Tribal Members who live in White Mesa and adjacent to the WMM are substantially affected by the DRC’s approval of License Amendment 7, which, for reasons explained in the accompanying Request for Agency Action, is contrary to applicable law, is arbitrary and capricious and beyond the tolerable limits of reason, and is based on determinations that are not supported by substantial evidence when viewed in light of the whole record. The DRC’s refusal to renew the WMM’s radioactive materials license (and impose additional license conditions to require EFRI to address ongoing and uncontrolled contamination and serious operational deficiencies at the WMM facility) prior to issuing License Amendment 7, and DRC’s assertions related to environmental contamination and risks to human health at the WMM facility (contained in the UTAH DIV. OF RADIATION CONTROL, PUBLIC PARTICIPATION SUMMARY, DAWN MINING ALTERNATE FEED AMENDMENT REQUEST, ENERGY FUELS RESOURCES (USA) INC. (ENERGY FUELS) (UTAH RADIOACTIVE MATERIAL LICENSE UT 1900479), WHITE MESA URANIUM MILL, SAN JUAN COUNTY UTAH(2014) *available at*

<http://www.deq.utah.gov/businesses/E/energyfuels/docs/2014/07Jul/EnergyFuelsDawnMiningPPSummary61014.pdf> (“PPS”)) create a significant risk that WMM activities will harm Tribal

lands, Tribal resources, and Tribal members.

**2. THE TRIBE CAN DEMONSTRATE THAT IT HAS STANDING TO INTERVENE UNDER BOTH THE “TRADITIONAL” AND “ALTERNATIVE” TESTS PROVIDED BY UTAH LAW**

In support of the Tribe’s claims that it has legal interests that are substantially affected by the DRC’s action approving License Amendment 7 and that the Tribe qualifies to intervene in this docket, the Tribe now demonstrates that it can meet both the “traditional” and “alternative” tests for standing under Utah law. *See Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶18. Under the “traditional” or “distinct and palpable injury” test, an entity bringing a request for agency action must assert: (1) the entity has been or will be adversely affected by the challenged actions; (2) there is a causal relationship between the injury and the relief requested; and (3) the relief requested is substantially likely to redress the injury caused. *See id.* (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)). The Tribe can demonstrate injury in this case. The DRC’s approval of License Amendment 7 and the DRC’s PPS determinations regarding the nature and extent of environmental contamination and risk to human health threaten a distinct and palpable injury to Tribal lands, the Tribal government, and to Tribal members who live in White Mesa and use Tribal lands and natural and water resources.

The Tribe can also demonstrate the redressibility and causation elements of the traditional test. The DRC is charged with evaluating the environmental impacts of License Amendment 7 and with minimizing the danger to public health and safety or the environment and ensuring that the issuance of the license will not be inimical to the health and safety of the public. Utah Admin. Code R-313-24-3, R-313-22-33. The Tribe’s injuries imminently result from the DRC’s

failure and refusal to properly evaluate the environmental impacts of License Amendment 7 or to ensure that the Revised License UT 1900469 minimizes danger to public health and safety or the environment. Thus, a causal connection exists between the DRC's approval of License Amendment 7 and the Tribe's injuries. Finally, the Tribe seeks to remand License Amendment 7 and the PPS to DRC for revisions consistent with the requested relief outlined in Section III, *infra*. The requested relief will redress the Tribe's injuries.

Under the alternative standing test, an entity requesting agency action must establish: (1) that it is the appropriate party to raise the issue in the dispute; and (2) that the issues the party seeks to raise are of "sufficient public importance." *Sierra Club*, 2006 UT 74, ¶¶36, 39. Here, the Tribe is the appropriate party to raise the issues in the accompanying Request for Agency Action because it is responsible for protecting Tribal and Tribal member-owned air, land and water resources and because it is responsible for the health and welfare of its members. In addition, the Tribe believes that it is the only party willing and able to bring a Request for Agency Action on the issues raised in the accompanying Request for Agency Action, and the Tribe has both the interest and the expertise necessary to investigate and review all legal and factual questions relating to License Amendment 7. *See id.* at ¶42.

The issues the Tribe raises in this Request are of great public importance. Issuing a license amendment to an outdated radioactive materials license without properly assessing environmental impacts of the license amendment or ensuring that the revised license adequately protects human health and the environment poses a serious public health threat to Tribal members and members of other communities surrounding the WMM and a long-term contamination risk to the land, water resources, and economic development activities of these

surrounding communities. As such, the Tribe has proper alternative standing to resolve this important matter in front of the Utah Department of Environmental Quality (“DEQ”).

**C. THE INTERESTS OF JUSTICE AND THE ORDERLY AND PROMPT CONDUCT OF THE PERMIT REVIEW PROCEEDING WILL NOT BE MATERIALLY IMPAIRED BY ALLOWING THE PROPOSED INTERVENTION AND THE TRIBE’S REQUEST FOR AGENCY ACTION**

Under Utah Code Ann. §§ 19-1-301.5(4), (7)(c)(ii)(b), a person who seeks standing in a permit review proceeding must, in the petition to intervene, demonstrate that the interests of justice and the orderly and prompt conduct of the permit review proceeding will not be materially impaired by allowing the intervention. *See also* Utah Code Ann. § 63G-4-207(2)(b) (providing the standards for granting intervention and stating that the presiding officer shall grant a petition for intervention if, among other items, the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention).

The Tribe can demonstrate that the interests of justice and the orderly and prompt conduct of License Amendment 7 support the Tribe’s proposed intervention. By filing its Petition to Intervene and its Request for Agency Action, the Tribe is properly seeking exhaustion of its administrative remedies relative to License Amendment 7. *See, e.g.*, Utah Admin. Code R305-7-203(6) (stating that failure to file a Request for Agency Action within the proper time period “waives any right to contest the permit order or to seek judicial review”). Because of the risks that License Amendment 7 and the DRC’s PPS determinations pose to Tribal legal interests, and because of the public importance of the issues raised in the Tribe’s Request for Agency Action, the interests of justice support the Tribe’s intervention and initiation of this round of administrative review.

Additionally, the Tribe notes that it is not currently interfering with the orderly and prompt conduct of License Amendment 7 because the Tribe is not seeking a stay of License Amendment 7 under Utah Code Ann. § 19-1-301.5(15) or Utah Admin. Code R-305-7-217. For these reasons, under Utah Code Ann. §§ 19-1-301.5(4), (7)(c)(ii)(b) the Tribe can demonstrate that the interests of justice and the orderly and prompt conduct of the permit review proceeding support the Tribe's proposed intervention.

**D. THE TRIBE PROPERLY PRESERVED ITS RIGHT TO INTERVENE BY TIMELY FILING DETAILED PUBLIC COMMENTS RELATING TO LICENSE AMENDMENT 7 AND BY CONSISTENTLY FILING EXTENSIVE PUBLIC COMMENTS IN EVERY AVAILABLE DRC FORUM TO PROVIDE THE DRC SUFFICIENT INFORMATION TO FULLY CONSIDER THE SUBSTANCE AND SIGNIFICANCE OF THE TRIBAL CONCERNS**

Utah Code Ann. §§ 19-1-301.5(4), (7)(c)(ii)(C) and Utah Admin. Code R305-7-204 require petitioners to provide sufficient public comments to preserve the right to intervene or contest an agency order. Here, the Tribe filed extensive public comments regarding License Amendment 7 on October 21, 2013. The Tribe has also filed extensive comments with DRC and the Utah Division of Air Quality (as well as filing two other Requests for Agency Action) that contained even more extensive comments and supporting documentation regarding the Tribe's concerns about environmental contamination and impacts to human health caused by the operation of the WMM facility. *See Exhibit A to the Request for Agency Action.* These comments provided sufficient information to allow DRC to fully consider the substance and significance of the Tribe's concerns before making a determination on License Amendment 7.

**III. REQUEST FOR RELIEF**

Based on the above, the Tribe respectfully requests that: (1) the determinations listed in the responses to the Tribe's public comments contained in the Public Participation Summary be reversed and vacated; and (2) the approval of License Amendment 7 be reversed and remanded

to the DRC with instructions that the DRC renew the WMM's radioactive materials license (and impose additional license conditions to require EFRI to address ongoing and uncontrolled contamination and serious operational deficiencies at the WMM facility) prior to issuing License Amendment 7 or other major license amendments.

Dated: August 11, 2014



H. Michael Keller  
Special Counsel  
Ute Mountain Ute Tribe  
Utah Bar # 1784

/s/ Celene Hawkins  
Celene Hawkins  
Associate General Counsel  
Ute Mountain Ute Tribe

Petition to Intervene  
January 11, 2013

## CERTIFICATE OF SERVICE

The undersigned caused the foregoing Petition to Intervene to be emailed today to:

Rusty Lundberg  
Director, Utah Division of Radiation Control  
[rlundberg@utah.gov](mailto:rlundberg@utah.gov)

Administrative Proceedings Records Officer  
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Because the email submission of the Request for Agency Action contains large exhibits, the undersigned also caused the foregoing Petition to Intervene to be hand delivered (electronic format) to:

Administrative Proceedings Records Officer  
Environment Division  
Utah Attorney General's Office  
195 North 1950 West  
Second Floor  
Salt Lake City, Utah 84116

Dated this 11<sup>th</sup> day of August, 2014

