

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
)	
(License Amendment for the North Trend Expansion Area))	ASLBP No. 07-859-03-MLA-BD01
)	

NRC STAFF'S NOTICE OF APPEAL OF LBP-08-06, LICENSING
BOARD'S ORDER OF APRIL 29, 2008, AND ACCOMPANYING BRIEF

Andrea' Z. Jones
Marcia J. Simon
Counsel for the NRC Staff

May 9, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTRODUCTION 1

BACKGROUND 1

I. Procedural History..... 1

II. Background on Exhibit B and the Aquifer Exemption Process 4

ARGUMENT 5

I. The Commission Should Take Jurisdiction of this Appeal Under
10 C.F.R. § 2.311 or § 2.341(f)(2)..... 5

II The Board Erred in Granting Standing to Petitioners Owe Aku and
Debra White Plume 6

III. The Board Erred in Admitting Contentions A and B..... 12

A. Petitioners’ Contentions as Originally Submitted are Inadmissible 12

B. The Board Erred in Relying on Exhibit B as Support for
Contentions A and B 14

1. The Board Misconstrued the Relevance of Exhibit B
to this Proceeding 14

2. The Board Improperly Used Exhibit B to Create Support
for Petitioners’ Contentions A and B..... 17

3. The Board Improperly Reformulated Contentions A and B 21

IV. The Board Erred in Admitting Contention C..... 23

A. The Board Incorrectly Applied the NHPA By Obligating the Applicant
to Comply with the Consultation Requirements..... 23

B. The Board Improperly Admitted Petitioners’ Contentions Without
Supporting Documentation Challenging the Information Regarding
the Prehistoric Indian Camp 25

V. The Board Erred in Admitting Contention E Because the Board Improperly Considered Foreign Ownership of the Applicant Within the Scope of this License Amendment Proceeding 26

CONCLUSION 29

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE DECISIONS</u>	<u>Page</u>
<u>Commission</u>	
<i>Andrew Siemaszko</i> CLI-06-16, 63 NRC 708 (2006)	22 n.66
<i>Arizona Public Service Co.</i> (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149 (1991).....	5 n.8, 12 n.42, 21 n.63
<i>Baltimore Gas & Electric Co.</i> (Calvert Cliffs Nuclear Power Plant, Units 1 & 2) CLI-98-25, 48 N.R.C. 325 (1998).....	19 n.58
<i>Commonwealth Edison Co.</i> (Zion Nuclear Power Station, Units 1 & 2) CLI-99-4, 49 NRC 185, 194 (1999).....	6 n.19, 7 n.21
<i>Duke Energy Corp.</i> (Oconee Nuclear Station, Units 1, 2, & 3) CLI-99-11, 49 NRC 328 (1999).....	19 n.57, 19 n.59, 21 n.64
<i>Fansteel, Inc.</i> (Muskogee, Oklahoma Site) CLI-03-13, 58 NRC 195 (2003).....	12 n.41, 14, 18 n.54, 21 n.65
<i>Florida Power & Light</i> (Turkey Point Units 3 & 4) CLI-01-17, 54 NRC 3 (2001).....	17 n.51
<i>International Uranium (USA) Corp.</i> (White Mesa Uranium Mill) CLI-01-21, 54 NRC 247 (2001).....	7 n.20, 7 n.24
<i>Nuclear Fuel Services</i> (Erwin, Tennessee) CLI-04-13, 59 NRC 244 (2004).....	7 n.23
<i>Sequoyah Fuels Corp. and General Atomics</i> (Gore, Oklahoma Site) CLI-94-12, 40 NRC 64 (1994).....	7 n.22
<i>Statement of Policy on Conduct of Adjudicatory Proceedings</i> CLI-98-12, 48 NRC 18 (1998).....	12 n.40, 18

<i>USEC, Inc.</i> (American Centrifuge Plant) CLI-06-9, 63 NRC 433 (2006).....	24 n.72, 25 n.75
<i>USEC, Inc.</i> (American Centrifuge Plant) CLI-06-10, 63 NRC 451 (2006).....	18 n.52, 20 n.62
 <u>Atomic Safety and Licensing Board Decisions and Orders</u>	
<i>Arizona Public Service Co.</i> (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397 (1991), <i>appeal denied on other grounds</i> , CLI-91-12, 34 NRC 149 (1991).....	5 n.8
<i>Commonwealth Edison Co.</i> (Zion Nuclear Power Station, Units 1 & 2) LBP-98-27, 48 NRC 271, (1998), <i>aff'd</i> CLI-99-4, 49 NRC 185 (1999).....	7 n.21
<i>Georgia Institute of Technology</i> (Georgia Tech Research Reactor) LBP-95-6, 41 NRC 281,(1995), <i>vacated in part and remanded on other grounds</i> , CLI-95-10, 42 NRC 1 (1995), <i>and affirmed in part</i> CLI-95-12, 42 NRC 111 (1995).....	21 n.63
<i>Hydro Resources, Inc.</i> LBP-98-9, 47 NRC 261 (1998).....	11 n.35
<i>Crow Butte Resources, Inc.</i> (License Amendment for the North Trend Expansion Project) Confirmatory Order (December 20, 2007)	2 n.5
<i>Crow Butte Resources, Inc.</i> (License Amendment for the North Trend Expansion Project) Confirmatory Order (January 24, 2008)	21 n.65
<i>Crow Butte Resources, Inc.</i> (License Amendment for the North Trend Expansion Project) Ruling on Standing and Contentions LBP-08-06, 67 NRC ____, (Apr. 29, 2008) (slip op.)	<i>passim</i>
<i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation) LBP-98-10, 47 NRC 288 (1998).....	18 n.53, 18 n. 55
<i>Safety Light Corp.</i> (Bloomsburg, Penn. Site) LBP-04-25, 60 NRC 516 (2004).....	19 n.59

<i>USEC, Inc.</i> (American Centrifuge Plant) LBP-05-28, 62 NRC 585 (2005).....	24 n.72
---	---------

STATUTES

42 U.S.C. § 2133 (AEA).....	28
42 U.S.C. § 4321 <i>et seq.</i> (NEPA)	23
16 U.S.C. § 470 <i>et seq.</i> (NHPA).	23
16 U.S.C. § 470f	23 n.69, 24 n.71
42 U.S.C. § 300h (Safe Drinking Water Act).....	4 n.15

REGULATIONS

10 C.F.R. § 2.309(c)	3 n.10, 16, 17, 27 n.78
10 C.F.R. § 2.309(d)(1).....	6 n.19
10 C.F.R. § 2.309(f)(1).....	23, 25, 26
10 C.F.R. § 2.309(f)(1)(i)-(vi)	12 n.40
10 C.F.R. § 2.309(f)(1)(iii)	26
10 C.F.R. § 2.309(f)(1)(iii)-(vi).....	18
10 C.F.R. § 2.309(f)(1)(vi).....	12, 14
10 C.F.R. § 2.309(f)(2).....	3 n.10, 14, 16
10 C.F.R. § 2.309(f)(2)(i)-(ii)	16, 17
10 C.F.R. § 2.309(f)(1)(v).....	18
10 C.F.R. § 2.309(f)(1)(vi).....	12, 19
10 C.F.R. § 2.309(i), (ii), and (v)	20 n.60
10 C.F.R. § 2.311(c)	5
10 C.F.R. § 2.341(f)(2)	5, 6
10 C.F.R. § 40.4.....	28 n.81

10 C.F.R. § 40.38.....28

10 C.F.R. § 40.38(a)28

10 C.F.R. § 40.44.....26 n.77

10 C.F.R. § 40.45.....26 n.77

10 C.F.R. § 40.46.....27 n.79

10 C.F.R. § 51.45.....23, 24

10 C.F.R. § 51.45(d)24

10 C.F.R. Part 11027 n.80

10 C.F.R. §110.28.....27 n.80

10 C.F.R. §110.29.....27 n.80

122 NEB. ADMIN. CODE, chs. 1-36 (2007).....4 n.16

FEDERAL REGISTER

USEC Privatization Act: Certification & Licensing of Uranium Enrichment Facilities;
62 Fed. Reg. 6,663 (Feb. 12, 1997).....28 n.81

Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182 (Jan. 14, 2004).....22 n.67

CASES

Arizona Copper Co. v. Gillespie
230 U.S. 46 (1913)11 n.38, 11 n.39

Hale v. Colorado River Municipal Water District
818 S.W. 2d 537 (Tex. 1991)11 n.38, 11 n.39

MISCELLANEOUS

Official Transcript of Proceedings, *Crow Butte Resources, Inc.*
(License Amendment for the North Trend Expansion Project)
Date: Jan. 16, 2008, Chadron Nebraska
Docket No. 40-8943-MLA3 n.9, 9 n.32, 10 n.33, 13 n.43, 24 n.70, 25 n.73

May 9, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
)	
(License Amendment for the North Trend Expansion Area))	ASLBP No. 07-859-03-MLA-BD01

NRC STAFF'S NOTICE OF APPEAL OF LBP-08-06, LICENSING
BOARD'S ORDER OF APRIL 29, 2008, AND ACCOMPANYING BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and (c), or, alternatively, 10 C.F.R. § 2.341(f)(2), the NRC Staff ("Staff") hereby files its Notice of Appeal and accompanying brief appealing the decision of the Atomic Safety and Licensing Board ("Board") granting the petitions for intervention and requests for hearing of Western Nebraska Resources Council ("WNRC"), Owe Aku/Bring Back the Way ("Owe Aku"), and Debra White Plume.¹ For the reasons discussed below, the requests for hearing petitions for intervention of all of the petitioners should be wholly denied.

BACKGROUND

I. Procedural History

On May 30, 2007, Crow Butte Resources, Inc. ("CBR" or "Applicant") requested an amendment to its existing operating license (SUA-1534) that would allow the development of a satellite in-situ leach (ISL) uranium recovery facility, the "North Trend Expansion Area"

¹ Memorandum and Order (Ruling on Standing and Contentions of Petitioners Owe Aku, Bring Back the Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 NRC ____, (Apr. 29, 2008) (slip op.) ("LBP-08-06").

("NTEA"), near its existing ISL operation in Crawford, Nebraska.² On November 12, 2007, NRC received timely petitions from Debra White Plume, Thomas K. Cook, Owe Aku, Slim Buttes Agricultural Development Corporation ("SBADC"), and WNRC. On December 6 and 7, 2007, the Applicant and Staff, respectively, filed responses to the petitions.³ In a subsequent Order, the Board granted Petitioners an extension of time to file replies, and, because all five petitioners had submitted identical contentions, the Board directed Petitioners' counsel⁴ to designate one of the petitions as a "Reference Petition."⁵ On December 28, 2007, Petitioners filed two replies: one on behalf of Thomas Cook, SBADC, and WNRC ("Cook Reply"), and the other on behalf of Debra White Plume and Owe Aku ("Owe Aku Reply").⁶ Petitioners also

² Letter from Stephen P. Collings to Charles L. Miller dated May 30, 2007 (ADAMS ML0715500570).

³ Response of Applicant, Crow Butte Resources to Petitions to Intervene Filed by Ms. Debra L. White Plume, Chadron Native American Center, Inc., High Plains Community Development Corporation, Thomas Kanatakeniate Cook, Slim Buttes Agricultural Development Corporation, Western Nebraska Resources Council (Dec. 6, 2007) ("Applicant's Response to Petitions"); NRC Staff's Combined Response in Opposition to Petitioners' Requests for Discretionary Intervention and Petitions for Hearing and/or to Intervene of Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way, Chadron Native American Center, High Plains Development Corporation, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Dec. 7, 2007) ("NRC Staff Response to Petitions").

⁴ Petitioners' counsel filed notices of appearance on December 17, 2007. Notice of Appearance of David C. Frankel (for WNRC, SBADC, and Thomas K. Cook); Notice of Appearance of Bruce Ellison (for Debra White Plume and Owe Aku).

⁵ Order (Confirming Matters Addressed on December 18, 2007 Telephone Conference) (Dec. 20, 2007) at 1, 3.

⁶ The Cook Reply also included supplemental affidavits concerning representational standing filed pursuant to the Board's December 20, 2007 Order. The staff responded to these supplemental affidavits on January 4, 2008. Pursuant to the Board's order granting an extension of time, Owe Aku provided three supplemental affidavits on January 10, 2008. The Staff and Applicant responded to those affidavits at the January 16 pre-hearing conference.

submitted their reference petition on December 28, 2007 and subsequently submitted a “Corrected Reference Petition” (“Ref. Pet.”) on January 9, 2008.⁷

On January 16, 2008, the Board heard oral argument on standing and contention admissibility in Chadron, Nebraska. At the hearing, counsel for Petitioners offered two documents, referred to as Exhibits A and B,⁸ in support of Petitioners’ standing and as additional bases for Contentions A and B.⁹ Petitioners’ counsel stated that they had received these exhibits on January 15, 2008. *Id.* at 89. The Staff and Applicant objected to these exhibits and requested an opportunity to respond after the pre-hearing conference. *Id.* at 68, 91. After a teleconference on January 23, 2008, the Board issued an order directing the Staff and Applicant to file responses to the new exhibits.¹⁰ In the same order, Petitioners were given an opportunity to file new or amended contentions based on “information that only recently became available.”¹¹ The Petitioners did not file any new or amended contentions. The Applicant and Staff filed their responses to Exhibits A and B on February 8, 2008,¹² and

⁷ Petitioners submitted a “Corrected Reference Petition” to correct inconsistencies noted by Staff counsel between the first reference petition and the original petitions.

⁸ Exhibit A is an e-mail from Dr. Hannan Lagarry of Chadron State College containing four paragraphs that discuss the subsurface geology of western Nebraska. Exhibit B is a letter from the Nebraska Department of Environmental Quality (“NDEQ”) to the Applicant, dated November 8, 2007, containing technical review comments regarding the Applicant’s petition to NDEQ for an aquifer exemption for the North Trend Expansion Area.

⁹ Transcript of January 16 Hearing (“Jan. 16 Tr.”) at 65, 87.

¹⁰ The Board directed Applicant and Staff to address “whether the exhibits in question, insofar as they were provided in support of Petitioners’ Contentions A and B, meet the requirements for newly-filed and/or late-filed contentions and amendments to contentions set forth at 10 C.F.R. §§ 2.309(f)(2) and/or 2.309(c); and, insofar as the exhibits were provided in support of standing, whether they were timely under relevant law on standing.” Order (Confirming Matters Addressed at January 23 Teleconference) (Jan. 24, 2008) at 2.

¹¹ *Id.* at 2.

¹² NRC Staff’s Response to Petitioners’ Exhibits A and B (“Staff Response to Exhibits”); Crow Butte Resources, Inc.’s, Response to Newly-Filed Exhibits A and B (“Applicant’s Response to Exhibits”).

Petitioners filed a combined reply to the Applicant's and Staff's Responses on February 15, 2008.¹³ Subsequently, also pursuant to the Board's January 24, 2008 Order, the parties filed briefs addressing the Fort Laramie Treaties of 1851 and 1868 and the United Nations Declaration of Rights of Indigenous Peoples on February 21 and 22, and responses to those briefs on February 29.¹⁴

II. Background on Exhibit B and the Aquifer Exemption Process

In addition to obtaining an amendment to its NRC source materials license, the Applicant, in order to conduct ISL uranium recovery at the North Trend Expansion facility, must obtain an aquifer exemption pursuant to the Underground Injection Control program of the Safe Drinking Water Act ("SDWA").¹⁵ The Applicant submitted a petition for an aquifer exemption to the Nebraska Department of Environmental Quality (NDEQ), the state licensing authority responsible for granting the exemption, on August 20, 2007.¹⁶ Petitioners' Exhibit B consists of a letter providing preliminary technical review comments of NDEQ based on Applicant's aquifer

¹³ Petitioners' Combined Reply to NRC Staff's and Applicant's Responses to Exhibits A and B ("Petitioners' Reply on Exhibits").

¹⁴ NRC Staff's Brief on Law Related to the Fort Laramie Treaties and the United Nations Declaration of Rights of Indigenous Peoples (Feb. 21, 2008) ("Staff's Treaty Brief"); Crow Butte Resources, Inc.'s Brief on Treaties and United Nations Declaration (Feb. 22, 2008); Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties and Federal Indian Law (Feb. 22, 2008); NRC Staff's Reply to Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law (Feb. 29, 2008) ("Staff's Treaty Reply"); Crow Butte Resources, Inc.'s Consolidated Response to Briefs on Treaties and United Nations Declaration (Feb. 29, 2008); Petitioners' Response to NRC Brief Regarding Treaties, Etc. (Feb. 29, 2008); Petitioners' Response to Applicant's Brief Regarding Treaties, Etc. (Feb. 29, 2008). Although Board ultimately did not consider this information in concluding that Petitioners had demonstrated standing, the Staff reiterates its position that Petitioners have no rights under the treaties or the United Nations Declaration that would confer standing, nor do they have Federal reserved water rights in the area of the proposed site that would confer standing. See Staff's Treaty Brief at 3-11; Staff's Treaty Reply at 4-11.

¹⁵ 42 U.S.C. § 300h (2000 & Supplement V).

¹⁶ Pursuant to section 1422 of the SDWA, the U.S. Environmental Protection Agency ("EPA") has delegated authority for administering the Underground Injection Control ("UIC") program to the NDEQ. NDEQ regulations for the UIC program are found in Title 122 of the Nebraska Administrative Code. 122 NEB. ADMIN. CODE, chs. 1-36 (2007).

exemption petition.¹⁷ *The aquifer exemption petition itself is not part of the record* in this NRC license amendment proceeding.

ARGUMENT

I. The Commission Should Take Jurisdiction of this Appeal Under 10 C.F.R. § 2.311 or § 2.341(f)(2)

As discussed more fully below, the Board committed several errors in reaching its decision to grant certain Petitioner's requests for hearing. First, the Board erred in granting standing to Petitioners Owe Aku and Debra White Plume, both of whom failed to make the necessary showing of a plausible connection between the injury they allege and the license amendment at issue. On the basis of standing, therefore, their petitions to intervene should have been denied. The Board also committed errors in admitting Contentions A, B and C and in considering Contention E as potentially admissible in this proceeding. The issues raised in Contention E are not relevant to the matters which will be considered by the Staff in its review of the amendment request which is the subject of this proceeding. While the Staff recognizes that the Board has not yet reached a final ruling on the admissibility of Contention E, the Board erred in retaining jurisdiction over a contention that raises issues which are beyond the scope of the proceeding.¹⁸ In these circumstances, immediate review is appropriate since the Board's errors are clear and ripe for appellate review. Based on these errors, the Staff seeks review of the Board's failure to wholly reject the intervention petitions on the grounds of failure to establish standing and to propound admissible contentions under 10 C.F.R. § 2.311(c).

Alternatively, the Staff requests that the Commission accept interlocutory review of the Board's decision, pursuant to 10 C.F.R. § 2.341(f)(2), on the grounds that the Board's errors will

¹⁷ The review comments resemble requests for additional information ("RAI") that the NRC Staff may issue during a licensing proceeding.

¹⁸ *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 411-12 (1991), *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991).

have a pervasive and unusual effect on the proceeding. As explained below, the Board has improperly and substantially expanded the test for demonstrating a plausible injury for standing. Additionally, the Board improperly supplied its own theory and support for Petitioner's inadequate contentions, drawing from comments contained in a letter to the applicant from a State agency concerning a permit application – none of which were relied on in the submissions by the Petitioners. Instead of deciding whether the Petitioners had proffered any admissible contentions, the Board substituted its own contentions for the inadmissible ones presented by the Petitioners, going so far as to provide entirely reformulated contentions which are far broader than those advanced by the Petitioners. The Board's reformulated contentions are overly broad and, because they are not grounded on any rulings regarding the bases presented by Petitioners, fail to place the parties on notice of the specific issues to be addressed at hearing. Together, these actions by the Board represent a wholly inappropriate intrusion into the hearing process, substituting its own concerns for those of the Petitioners and taking jurisdiction over matters which are not within the scope of this proceeding. These errors will have a pervasive effect on the proceeding, and would be difficult if not impossible to remedy should the proceeding be allowed to proceed. Therefore, interlocutory review is warranted under 10 C.F.R. § 2.341(f)(2).

II. The Board Erred in Granting Standing to Petitioners Owe Aku and Debra White Plume

Under Commission regulations and case law, it is a petitioner's burden to "set forth a clear and coherent argument" to demonstrate standing.¹⁹ As discussed below, Petitioners Owe Aku (through its member, David House) and Debra White Plume failed to demonstrate that they will suffer an injury that is fairly traceable to the license amendment. Therefore, the Board should have denied them standing. Instead, the Board, using an impermissibly broad

¹⁹ *Commonwealth Edison Co. (Zion Nuclear Power Station, Units 1 & 2)*, CLI-99-4, 49 NRC 185, 194 (1999); see also 10 C.F.R. § 2.309(d)(1).

construction of “plausible chain of causation,” erroneously concluded that these petitioners had demonstrated injury-in-fact.

To establish standing, a petitioner must demonstrate an “actual or threatened” injury that is “fairly traceable to the challenged action” and “likely to be redressed by a favorable decision.”²⁰ To establish that an injury is “fairly traceable,” a petitioner must establish a causal nexus between the alleged injury and the challenged action.²¹ A determination that the injury is fairly traceable to the challenged action does not depend “on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is *plausible*.”²² Moreover, absent an obvious potential for harm, it is the petitioner’s burden to provide a “specific and plausible” explanation of how the proposed action will affect him.²³ In order to show standing based on alleged contamination of water, the Commission has found that a petitioner must “outline a pathway or mechanism” through which such contamination would reach the water he uses or drinks.²⁴

In this case, the proposed expansion site is located approximately one mile north of Crawford, Nebraska, approximately 30 miles from the Nebraska/South Dakota border. The southwestern border of the Pine Ridge Reservation is approximately 35-40 miles northeast of proposed site. The major surface water feature in the area is the White River, which flows from

²⁰ *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 250 (2001).

²¹ *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), *aff’d* CLI-99-4, 49 NRC 185 (1999).

²² *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 (1994) (emphasis added).

²³ *Nuclear Fuel Services* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

²⁴ *See International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 252-253 (2001).

the southwest, crosses the southeastern corner of the proposed expansion site, and then flows northeast to the Pine Ridge Reservation.²⁵ CBR intends to extract uranium from the Basal Chadron Formation, which is approximately 650 feet below grade.²⁶ Overlying the Basal Chadron are two confining layers, the Upper and Middle Chadron, which together are approximately 500 feet thick and which consist of claystone, mudstone, and siltstone. *Id.* The Brule Formation, which extends to approximately 110 feet below the surface, overlies the Upper Chadron. *Id.* Groundwater exists in the Brule and Basal Chadron formations.²⁷

Both David House and Debra White Plume assert as a potential injury that they drink or use water from aquifers or from the White River that may be contaminated if the license amendment is granted; however, both Mr. House and Ms. White Plume fail to make factual assertions that demonstrate a plausible chain of causation—a plausible mechanism by which contamination would reach the water they use or drink.²⁸ For example, Mr. House’s affidavit states that he lives eight miles south-southwest of the Crow Butte Resources uranium recovery operation and proposed expansion,” that he drinks water from a well on his property that is in the Brule aquifer, and that he is concerned about the effects of the expansion on his well and on surface water.²⁹ These assertions do not propose a pathway by which contamination would reach his property from the North Trend site. With respect to groundwater contamination, demonstration of a plausible mechanism would require, for example, facts indicating that

²⁵ See Application for Amendment of USNRC Source Materials License SUA-1534, North Trend Expansion Area, Technical Report, Volume 1 (“TR”) at 2.2-21, 2.2-22 (ADAMS ML071760344).

²⁶ *Id.* at 2.6-9, 2.6-10.

²⁷ *Id.* at 2.2-24.

²⁸ See Affidavit of David House at 1-2 (“House Aff.”); Affidavit of Debra White Plume at 1-2 (“White Plume Aff.”).

²⁹ House Aff. at 1-2.

groundwater flows south from the proposed expansion site towards Mr. House's property, and that water has been shown to flow upward from the Basal Chadron aquifer (where extraction occurs) to the Brule aquifer (where Mr. House's well is located). Furthermore, as the Board noted, with regard to surface water contamination (the White River), Mr. House lives upstream from the proposed expansion site, as well as Applicant's existing operation, and therefore cannot demonstrate that contamination in the river would flow upstream to reach him. Mr. House has also failed to identify how close he lives to the river, or what use he makes of it.

Ms. White Plume's assertions of standing are likewise deficient. Ms. White Plume states that she lives 60 miles north-northeast of the proposed expansion site and that the well on her property draws from an aquifer that "upon information and belief mixes with the Chadron and/or Brule aquifers."³⁰ She also states that the project may impact her family's ability to fish in the White River, which drains from the project area and flows through Pine Ridge Reservation.³¹ These statements do not demonstrate a plausible chain of causation by which contamination could reach Ms. White Plume's well or the river where she fishes.

Petitioners failed to provide any further support for a plausible chain of causation in their subsequent statements in support of standing at oral argument or in subsequent pleadings. At oral argument, Petitioners, citing Exhibit B, argued that intermixing and connectivity of aquifers provides the necessary causal nexus for standing.³² However, Petitioners failed to identify information in Exhibit B that supports a plausible basis on which to conclude that water from the Basal Chadron formation, where uranium will be extracted, will move upward through several

³⁰ White Plume Aff. at 2. The Staff notes that a distance of 60 miles would be insufficient to grant proximity-based standing in a *nuclear reactor* licensing proceeding.

³¹ *Id.*

³² See, e.g., Jan 16 Tr. at 62, 88-89, 92, 99. Petitioners stated that Exhibit B was an "important basis for standing arguments" and was submitted to show a plausible chain of causation. *Id.* at 88-89.

hundred feet of clay and siltstone to the Brule formation and significant distances horizontally to reach them.³³ Simply alleging that deficiencies exist in an application, or that knowledge of geology and hydrology is not complete, is not the same as making an affirmative showing that a plausible connection between the proposed operation and the alleged injury exists. Thus, Petitioners failed to meet their burden of demonstrating standing based on injury-in-fact.

Despite the deficient showings discussed above, the Board concluded that Petitioners had demonstrated injury-in-fact. In doing so, the Board impermissibly broadened the concept of “plausible chain of causation.” The Board found that “[p]etitioners have demonstrated that some level of interconnection and conductivity between aquifers is plausible,” LBP-08-06 at 43, stating that

it is at least *plausible* to conclude, in light of *past undisputed excursions and spills* from Applicant’s mining operations ..., taken together with the *lack of complete knowledge* about the hydrogeology of the area in question, that there is the *possibility* of contamination of water *that might mix* with water ultimately used by at least some of the Petitioners.

LBP-08-06 at 42 (emphasis added).

Far from illustrating the required plausible chain of causation, these general statements speak only to “possibility.”³⁴ The mere occurrence of past excursions and spills does not demonstrate a plausible *chain of causation* that could cause injury to a particular petitioner.

³³ Petitioners argued that Exhibit B shows that the Applicant used old, inaccurate, or insufficient data; used improper nomenclature for geological formations, did not provide site-specific information, and did not incorporate results of certain geological studies. Jan 16 Tr. at 88-89, 166-67. Even if these deficiencies exist in the application, they do not demonstrate a plausible chain of causation because none of them relate to the hydrology or geology of the site where uranium recovery will occur. Furthermore, the studies referred to in the document focus on stratigraphy, not hydrogeology, and although they discuss faults, there is no indication in Exhibit B that the faults referred to in these studies are present anywhere near the proposed uranium recovery site. See Jan 16 Tr. at 92; Exhibit B at 2-4, 6, 8, 10. Petitioners repeated similar arguments in their replies to Staff’s and Applicant’s responses to the exhibits.

³⁴ The Staff notes that “plausible” means “seemingly or apparently valid, likely, or acceptable,” while possible means “capable of happening, existing, or being true without contradicting proven facts, laws, or circumstances.” American Heritage Dictionary (New College Ed.) 1986.

Nor, by itself, does lack of complete knowledge of geology and hydrology.³⁵ The other information the Board appears to have considered in reaching this determination is equally speculative.³⁶ Thus, the Board erred in applying this “possibility” standard in this proceeding and in using it to find that Owe Aku had standing. See LBP-08-06 at 47.

In deciding that Debra White Plume had standing, the Board relied on Ms. White Plume’s statements in her supplemental affidavit, which, as explained above, are facially insufficient to establish a plausible chain of causation.³⁷ The Board also relied on cases in which contamination was carried significant distances in rivers.³⁸ See LBP-08-06 at 51-52, 55. However, the Board’s reliance on these cases is inapt. In both of the cited cases, the plaintiffs were able to demonstrate actual injury, thereby automatically satisfying the causation element.³⁹ In contrast, Ms. White Plume has not provided any evidence that the White River has been

³⁵ Petitioners and the Board both cite *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261 (1998) (“*HRI*”) for the proposition that lack of knowledge creates sufficient doubts to establish injury-in-fact. *Id.* at 275. However, in *HRI* the Board granted standing to petitioners who used substantial quantities of water from a source “reasonably contiguous” (e.g., one-half mile) to the sites where the uranium recovery process was to occur. Here, Petitioners have failed to make that showing.

³⁶ The Board relied on unsupported statements in Petitioners’ pleadings, statements from the application taken out of context, and its own misunderstanding of statements in the application and in Exhibit B. For example, the Board states that Exhibit B brings into question lack of connectivity between the Chadron and Brule aquifers; however, nothing in Exhibit B refers to connectivity between these aquifers. LBP-08-06 at 40. The Board also inferred that mixing and connectivity of aquifers exists based on statements in Applicant’s ER, quoted by Petitioners, indicating that the “overlying aquifer” at the site was difficult to determine, and that some future testing would be necessary. *Id.* at 41 and nn.172-73. Because “the exact definition of the ‘overlying aquifer’ at North Trend [was] difficult to determine,” the applicant performed pump testing which provided assurance that adequate confinement existed. ER at 3.4-78. Because this testing was not performed in some areas, the applicant noted that it would have to perform additional testing before uranium recovery in those areas. *Id.* at 3.4-79. When read in the proper context, these statements do not support the Board’s inference.

³⁷ The Board did not explicitly rely on the possibility of mixing of aquifers in determining Ms. White Plume’s standing, but if it had, the same arguments raised with respect to Owe Aku’s standing would apply.

³⁸ The cases the Board cites are *Arizona Copper Co. v. Gillespie*, 230 U.S. 46 (1913) and *Hale v. Colorado River Municipal Water District*, 818 S.W.2d 537 (Tex. 1991).

³⁹ See *Arizona Copper Co.*, 230 U.S. at 52; *Hale*, 818 S.W.2d at 538-39.

contaminated in the area where she fishes and that such contamination can be shown to come from the Crow Butte operation. Therefore, the Board erred in concluding that Ms. White Plume has standing.

III. The Board Erred in Admitting Contentions A and B

As explained below, Petitioners' Contentions A and B, as submitted in the original petitions, fail to meet the contention admissibility requirements. Petitioners' submission of Exhibit B does not change this result, because Petitioners failed to explain how Exhibit B supports their contentions. Instead of properly denying the contentions, the Board inappropriately looked to Exhibit B to find support for Petitioners' contentions where Petitioners supplied none. Therefore, the Board's erred in admitting Contentions A and B.

A. Petitioners' Contentions as Originally Submitted are Inadmissible

The Commission's regulations and policy clearly place the burden of demonstrating contention admissibility on petitioners.⁴⁰ To demonstrate adequate support for contentions, petitioners must provide a factual argument or expert opinion, and supporting documents that support its position. Furthermore, a petitioner must "provide analysis and supporting evidence as to why ... particular sections of [a document] provide the basis for the contention."⁴¹ Also, to demonstrate a genuine dispute of material law or fact, Petitioners must cite specific portions of the application that are in dispute and explain the reasons for disagreement, or identify sections of the application that are deficient and explain why it is deficient. 10 C.F.R. § 2.309(f)(1)(vi). Failure to meet any one of these requirements will result in the rejection of a contention.⁴²

⁴⁰ See 10 C.F.R. § 2.309(f)(1)(i)-(vi); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

⁴¹ *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 204 (2003) (internal quotations omitted).

⁴² *Arizona Public Service Co.* (Palo Verde Nuclear Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

Petitioners' original contentions A and B were stated as follows:

Contention A: CBR's Mining Operations Use and Contaminate Substantial Water Resources and Radioactive Wastewater Mixes with Brule and High Plains Aquifers and Moves in a Slow-Moving Plume. (Ref. Pet. at 9)

Contention B: ISL Mining is NOT Environmentally Friendly; ISL Mining May Have Caused Health Impacts at Pine Ridge Indian Reservation Closing 98 Wells (Ref. Pet. at 15)

As support for these contentions, Petitioners cite and quote from portions of the Applicant's Technical Report (TR) or Environmental Report (ER) and follow these quotes with short statements (labeled "contentions"), typically one to two sentences, that make various assertions regarding the quoted portions of the application.⁴³ *Id.* at 9-15 (Contention A); 15-21 (Contention B). Some of Petitioners' assertions allege omissions from the application, while others allege that the quoted portion "shows" that contamination exists or that Applicant is mistaken about something.⁴⁴

As bases for the contentions, the quotations from the application and statements that follow do not provide adequate factual support or expert opinion to support Petitioners' contentions.⁴⁵ In particular, Petitioners fail to set forth the necessary technical analysis to show

⁴³ Because it was not clear whether these statements were additional contentions or merely bases, the Staff responded as if they were both. See NRC Staff Response to Petitions at 20. At oral argument, the Board expressed its view that these statements were bases for Petitioners' contentions. See Jan 16 Tr. at 241.

⁴⁴ Petitioners' statements/bases for Contention A allege improper aquifer restoration standards, Ref. Pet. at 10, 15; mixing of aquifers, *id.* at 10, 12; excessive water usage, *id.* at 10, 15; lack of adequate confinement, *id.* at 11, 12; existence of a slow-moving radioactive plume, *id.* at 14; failure to discuss drought, earthquakes, and climate change, *id.* at 10, 14; and aquifer contamination, *id.* at 13. Petitioners' statements/bases for Contention B include inability to restore aquifers to pre-operational condition, *id.* at 16; environmental impacts of excursions, *id.* at 17; necessity for climate change analysis due to impact of rains and flooding on safety, *id.* at 17; increase in radon levels, *id.* at 17; failure to consider drought and climate change, *id.* at 18, 19; impact to Crawford's water supply, *id.* at 18; impacts on groundwater quality, *id.* at 18; allegations of leaks of radioactive material, *id.* at 19; allegations of movement of radioactive material between Chadron and Brule aquifers, *id.* at 19; allegations of a leaks, *id.* at 20; and allegations regarding radiation dosages, *id.* at 21.

⁴⁵ The Staff addressed the deficiencies in Contention A and B and their bases in detail in its response to the petitions. See NRC Staff Response to Petitions at 20-40.

why these bases support the contentions. *Fansteel*, CLI-03-13, 58 NRC at 205. Petitioners also fail to demonstrate a genuine dispute of material fact or law with the Applicant, because, although they refer to specific portions of the application and make statements about those portions, Petitioners provide no supporting reasons for the positions they assert. See 10 C.F.R. § 2.309(f)(1)(vi). Moreover, in several instances, Petitioners take statements out of context. Because Petitioners merely restate sections of the application and comment on them, without providing reasons why the application is deficient, they do not raise a genuine dispute of fact or law with the Applicant. Thus, Contentions A and B are inadmissible because they fail to comply with several of the Commission's contention admissibility requirements.

B. The Board Erred in Relying on Exhibit B as Support for Contentions A and B

In deciding that Contentions A and B were admissible, the Board relied substantially, if not exclusively, on Exhibit B. See LBP-08-06 at 94-97. Throughout its opinion, the Board stresses the significance and persuasiveness of Exhibit B in its decision to admit Contentions A and B. See *id.* As discussed below, the Board erred in relying on Exhibit B for several reasons. First, the Board improperly concluded that Exhibit B was "relevant" to this proceeding. See *id.* at 22-23. Second, even if Exhibit B is "relevant," Petitioners failed to explain how Exhibit B supports their contentions or to tie Exhibit B to deficiencies in the CBR application pending before the NRC, as they are required to do under the Commission's contention admissibility requirements. Finally, after Petitioners failed to meet their burden under the pleading rules, the Board improperly used Exhibit B to develop its own substantive support for Petitioners' contentions.

1. The Board Misconstrued the Relevance of Exhibit B to this Proceeding

Commission regulations and case law clearly state that a contention must address the adequacy of the application. 10 C.F.R. § 2.309(f)(2). Thus, only claims made by Petitioners on the NRC license amendment application that is the subject of this proceeding can form the

basis for an admissible contention. In determining that Exhibit B could be used as a basis for contentions A and B, the Board incorrectly considered Exhibit B to be new information regarding the NRC license amendment application which supported a non-timely amendment of Petitioners' contentions.⁴⁶

As the Staff argued before the Board, Exhibit B does not relate to the application pending before NRC, but to the Applicant's separate and independent petition to NDEQ for an aquifer exemption.⁴⁷ The aquifer exemption petition is not part of the record of this NRC license amendment proceeding and is not available to the Staff or to the Board. Moreover, the aquifer exemption process is a separate proceeding, governed by separate statutory and regulatory requirements, that has no bearing on the Staff's decision in this license amendment proceeding.

In ruling on the "relevance" of Exhibit B, the Board dismissed the above arguments. Instead, the Board relied on a single statement, made by the Applicant in a pleading, that "nothing in Exhibit B is based on information different from information available in the application or ER." From this statement, the Board concluded that "the information on which Exhibit B is based is essentially the same as that to be found in the Application." LBP-08-06 at 16. However, because the aquifer exemption petition is not part of the record in the NRC proceeding, the Board made this assumption without ever having compared the two documents. In fact, the Staff provided several examples to the Board indicating that deficiencies noted in

⁴⁶ Stating that it considered Exhibit B to provide "information in the nature of expert support" for Petitioners' arguments, the Board accepted NDEQ's statements as those of Petitioners absent any independent analysis or identification of deficiencies by the Petitioners. LBP-08-06 at 97.

⁴⁷ Although there may be some overlap between the Applicant's aquifer exemption petition and its NRC license amendment application, they are nonetheless two distinct documents that are subject to review under different statutory and regulatory review processes. NRC does not review or comment on the aquifer exemption petition, and NDEQ does not comment on the NRC license amendment application.

Exhibit B for the aquifer exemption petition were not present in the application CBR submitted to NRC.⁴⁸

Regardless of the validity of the Board's assumption that "the information on which Exhibit B is based is essentially the same as that to be found in the Application," the Board's assumption is irreconcilable with its finding that Exhibit B presented "new information" upon which Petitioners could amend their contentions after the time for submitting petitions had expired. Assuming that Exhibit B was based on the same information that is present in the NRC application, Petitioners' submission of Exhibit B was untimely under 10 C.F.R. § 2.309(f)(2) and (c).⁴⁹ A new or amended contention must be based on information regarding the application which is under review that was not previously available and is materially different from information previously available to Petitioners. See 10 C.F.R. § 2.309(f)(2)(i)-(ii). If, as the Board assumes, the application and the aquifer exemption petition contain the same information, then Petitioners had all the information they needed to identify the same deficiencies found in Exhibit B available to them in July, 2007, when the application and supporting documents were made publicly available.⁵⁰ Therefore, Petitioners' proffer of Exhibit

⁴⁸ See NRC Staff Response to Exhibits at 22-23. For example, the Staff informed the Board that the application contains site-specific geologic cross-sections and pumping test data in support of its conclusions about lack of connectivity of aquifers. *Id.* at 22 (citing TR at §§ 2.6, 2.7 and Appendix C). Petitioners have not argued that these data have been misinterpreted or that the information in the application is incorrect, nor have they provided their own site-specific geological information to contest the Applicant's findings and conclusions.

⁴⁹ In finding that Exhibit B was timely submitted as a basis for standing and Contentions A and B, the Board found that Petitioners had met the requirements of 10 C.F.R. § 2.309(f)(2). LBP-08-06 at 14. Alternatively, the Board found that Petitioners had good cause for untimely filing under § 2.309(c) because Petitioners only became "reasonably aware" of Exhibit B when it was provided to them by another organization just before the oral argument. *Id.* The Board also found that a balancing of the other 2.309(c) factors supported Petitioners' position, but did not provide any explanation for this finding. *Id.*

⁵⁰ The records in ADAMS indicate that the license amendment application, Technical Report, and Environmental Report (with the exception of withheld cultural resources information) were all publicly available in ADAMS no later than July 6, 2007.

B at oral argument in January, 2008, cannot be considered “information that was not previously available,” nor can it be considered information that is “materially different than information previously available.” 10 C.F.R. § 2.309(f)(2)(i)-(ii).

For the same reasons, Petitioners cannot be found to have good cause for untimely filing under 10 C.F.R. § 2.309(c). Even if NDEQ’s analysis identified issues that Petitioners overlooked in the NRC application, the underlying information reviewed was the same for both under the Board’s analysis. The Board’s observation that Exhibit B contained “original analysis” actually undercuts its conclusion on timeliness, Petitioners have an "ironclad obligation" to examine the application and publicly available documents to uncover any information that could serve as a foundation for a contention, and to conduct their own analysis and proffer contentions which are adequately supported.⁵¹ Therefore, if the application contained the same information as the aquifer exemption petition, as the Board concluded, Petitioners were obligated to find the same deficiencies in the application that NDEQ found in the aquifer exemption petition. Their failure to do so does not entitle them to amend their contentions later to include the deficiencies NDEQ identified. Even more fundamentally, this fact does not allow a Board to decide, on its own, to pursue issues that were not identified in Petitioners’ contentions.

2. The Board Improperly Used Exhibit B to Create Support for Petitioners’ Contentions A and B

Even assuming *arguendo* that the Board was correct in finding Exhibit B relevant and timely, the Board should not have considered Exhibit B as support for Petitioners’ contentions because Petitioners failed to explain how Exhibit B supports their contentions and to connect Exhibit B with specific portions of the application. “A contention’s proponent, not the licensing board, is responsible for formulating the contention and providing the necessary information to

⁵¹ *Florida Power & Light* (Turkey Point Units 3 and 4), CLI-01-17, 54 NRC 3, 24-25 (2001).

satisfy the basis requirement....” *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998). Furthermore, the petitioner must also demonstrate that the issue raised is within the scope of the proceeding; is material to the findings NRC must make; is adequately supported by alleged facts, expert opinion, and supporting documents; and creates a genuine dispute with the applicant on a material issue of law or fact. 10 C.F.R.

§ 2.309(f)(1)(iii)-(vi).

Petitioners fail to provide the necessary showing that Exhibit B supports their contentions as required by 10 C.F.R. § 2.309(f)(i)(v). According to Commission case law, it is a petitioner’s obligation to “make clear why cited references provide a basis for a contention.”⁵² Merely attaching a document in support of a contention without any explanation of its significance does not provide an adequate basis for a contention.⁵³ Rather, a petitioner must “provide analysis and supporting evidence as to why ... particular sections of [a document] provide the basis for the contention.”⁵⁴ Because Petitioners have merely provided Exhibit B without providing the necessary analysis or explanation to show why it supports their contentions, Exhibit B is not an adequate basis for a contention.⁵⁵

⁵² *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 457 (2006).

⁵³ *Private Fuel Storage (ISFSI)*, LBP-98-10, 47 NRC 288, 298-99 (1998).

⁵⁴ *Fansteel, Inc. (Muskogee, Oklahoma Site)*, CLI-03-13, 58 NRC 195, 204 (2003) (internal quotations omitted).

⁵⁵ *Private Fuel Storage*, LBP-98-10, 47 NRC at 298-99. The Staff notes that the Board refers in passing to the U.S. Geological Survey (USGS) “Ground Water Atlas of the United States: Kansas, Missouri and Nebraska” as support for Contentions A and B. LBP-08-06 at 100. Petitioners cited this document in their original petitions and made factually incorrect statements based on it, without citing specific portions of the document to support those statements. See Ref. Pet. at 9; see also NRC Staff Response to Petitions at 22-24. Thus, for the same reasons discussed in this section for Exhibit B, the USGS Atlas is not an adequate basis for a contention.

Furthermore, Exhibit B represents no more than the state's preliminary views on the adequacy of the aquifer exemption petition.⁵⁶ As such, the role of Exhibit B in the state's proceeding is analogous to the use of a request for additional information (RAI) in an NRC proceeding. Like an RAI, Exhibit B poses questions and indicates areas requiring clarification or further discussion, information, or analysis in order to proceed with the aquifer exemption process.⁵⁷ Contentions in NRC proceedings must be based on the license application, not on Staff reviews; therefore, Petitioners in this case should not be permitted to base contentions on an analogous state agency review.⁵⁸ Furthermore, rather than simply "rest[ing] on [the] mere existence" of Exhibit B as a basis for their contention, Petitioners must "provide[] ... *analysis, discussion, or information of their own* on any of the issues raised" in Exhibit B.⁵⁹

Finally, the NDEQ review comments in Exhibit B, without more, are not sufficient to raise a genuine dispute of material fact or law with the Applicant with respect to the application submitted to NRC. 10 C.F.R. § 2.309(f)(1)(vi). Petitioners have not cited specific portions of the application that are in dispute and explained how Exhibit B relates to those sections and supports their position. 10 C.F.R. § 2.309(f)(1)(vi). Therefore, Contentions A and B are inadmissible on this ground as well.

⁵⁶ See Exhibit B at 1, stating in the cover letter that the comments are the result of a "preliminary review" of the aquifer exemption petition.

⁵⁷ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 336 (1999). With respect to the Board's characterization of Exhibit B as consisting "primarily of fairly extensive original analysis," LBP-08-06 at 13, the Staff notes that whatever "analysis" NDEQ has done has been in the context of reviewing the aquifer exemption petition for compliance with state regulations, not reviewing the application submitted to NRC to find support for Petitioners' contentions.

⁵⁸ See *Baltimore Gas & Electric* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 349-50 (1998).

⁵⁹ *Oconee*, CLI-99-11, 49 NRC at 336-37 (emphasis added); see also *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-04-25, 60 NRC 516, 526 (stating that a petitioner must "provide analysis, discussion or information showing with specificity that the RAI is evidence" that the license application is deficient).

Despite Petitioners' failure to explain how Exhibit B supports their contentions, the Board, on its own initiative, improperly found support in Exhibit B for Petitioners' contentions.⁶⁰ Other than Exhibit B, the only specific information that the Board cites in support of its decision to admit these contentions is "Petitioners' reference to leaks, including the spill on the frozen White River" and "information about current usage of well water for drinking, including from the Basal Chadron aquifer." LBP-08-06 at 95-97.⁶¹ This information, coupled with the contentions that Petitioners provided, does not make Contentions A or B admissible. The Board's action in providing supporting explanations on Petitioners' behalf was clearly contrary to Commission precedent. The Commission has recently stressed that while it expects licensing boards "to examine cited materials to verify that they do, in fact, support a contention," a board may not "simply 'infer' unarticulated bases for contentions."⁶² This reaffirms prior holdings stating that a board may not make factual inferences on a petitioner's behalf, or supply information that is lacking.⁶³

⁶⁰ The Board found that Exhibit B considers "information that is essentially the same as that contained in the Application at issue" and raises "many of the same concerns that Petitioners raise" in their petition. LBP-08-06 at 94. In addition, the Board found that Exhibit B "corroborates" information provided by Petitioners regarding leaks and spills and current usage of well water; that Exhibit B "bolsters" Petitioners identification of portions of the Application that indicate a lack of complete information; that Exhibit B is "persuasive and strong support for Petitioners' arguments regarding the inadequacy of the Application in addressing issues of conductivity ... between the Chadron and Brule aquifers, and between groundwater and the White River;" that Petitioners "fact-based argument, supported by Exhibit B, clearly satisfies" the requirements of 10 C.F.R. § 2.309(f)(1)(i),(ii), and (v); and that "particularly through Exhibit B," Petitioners have provided "more than sufficient information to show that the parties are in genuine dispute." *Id.* at 95-97. The Board also stated that it considers Exhibit B to provide "information in the nature of expert support" for Petitioners' arguments. *Id.* at 97.

⁶¹ The Board does not state specifically where the information concerning well usage comes from. The Board further states that "Petitioners provide explanations for most [of their] arguments in Contentions A and B," but did not elaborate on what those explanations or arguments were. *Id.* at 95.

⁶² *USEC, CLI-06-10, 63 NRC at 457.*

⁶³ *See, e.g., Georgia Institute of Technology (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995), vacated in part and remanded on other grounds, CLI-95-10, 42 NRC 1, and aff'd in part CLI-95-12, 42 NRC 111 (1995) (internal citations omitted), citing Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).*

The Board explicitly recognized that “many of Petitioners’ arguments “are less than perfectly articulated, and some lack an ideal level of support.” LBP-08-06 at 95. The Board attributed this to the fact that Petitioners originally filed their petitions *pro se*. See *id.* at 17. However, even *pro se* petitioners are required to comply with the pleading requirements.⁶⁴ The Board also attempted to excuse Petitioners’ failure to meet this obligation, stating that Petitioners did not provide such explanation at oral argument because they “presented the document the very morning after they received it.” LBP-08-06 at 22. However, Petitioners had several subsequent opportunities to provide such an explanation. For instance, Petitioners could have explained how Exhibit B supported their contention when they replied to Applicant and Staff’s responses to the exhibits. Furthermore, the Staff emphasizes that *after Petitioners retained counsel they were given an opportunity to amend Contentions A and B based on the exhibits proffered at oral argument, but did not do so.*⁶⁵

For the reasons stated above, the Commission should reverse the Board’s decision to admit reframed Contentions A and B.

3. The Board Improperly Reformulated Contentions A and B

The Board’s reformulation of Contentions A and B is further evidence of their error in admitting these contentions. The Board has reformulated contentions which had several specific, albeit inadequately supported, bases, and which referred to specific portions of the

⁶⁴ See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338-39 (1999) (reiterating the long-standing principle that “a person who invokes the right to participate in an NRC proceeding also voluntarily accepts the obligations attendant upon such participation.”).

⁶⁵ See Order (Confirming Matters Addressed at January 23 Teleconference) (Jan. 24, 2008) at 3. In *Fansteel*, the Commission noted their disapproval with petitioners “who, despite being informed of the shortcomings of their petitions...nonetheless fail to correct them....” CLI-03-13, 58 NRC 195, 205 n.31 (2003). While that comment was addressed to petitioners who failed to address shortcomings in a reply brief, a similar argument can be made here, where Petitioners had two opportunities to address their shortcomings in explaining how Exhibit B supports their contentions.

application, into broad, general contentions encompassing the entire application. As reformulated, Contentions A and B read as follows:

Contention A: CBR's License Amendment Application does not accurately describe the environment affected by its proposed mining operations or the extent of its impact on the environment as a result of its use and potential contamination of water resources, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

Contention B: CBR's proposed expansion of mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

LBP-08-06 at 101.

Even if the contentions had been admissible, these rewritten contentions far exceed the Board's authority to recast admissible contentions for purposes of clarity, succinctness, or efficiency of a proceeding.⁶⁶ Furthermore, in reframing the contentions, the Board did not rule on the specific bases put forth by Petitioners, with the exception of Petitioners' challenge to dose limits. LBP-08-06 at 99. Except for a brief discussion of why drought and climate change are within the scope of the proceeding, the Board has provided no analysis or decision as to the admissibility of these bases. *Id.* at 94-101. Thus, if this hearing were to go forward, it is not clear what the specific bases to be litigated would be. This situation is at odds with the Commission's contention admissibility standards, whose purpose is "to ensure ... that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues."⁶⁷

⁶⁶ *Andrew Siemaszko*, CLI-06-16, 63 NRC 708, 720 (2006).

⁶⁷ Changes to Adjudicatory Process; Final Rule, 69 Fed. Reg. 2,182, 2,189-90 (Jan. 14, 2004).

IV. The Board Erred in Admitting Contention C

As explained in this appeal, Petitioners' Contention C, as submitted in the original petitions, fails to meet the Commission's contention admissibility requirements because it fails to "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." See 10 C.F.R. § 2.309 (f)(1).

Petitioners' Contention C reads as follows:

Contention C: Prehistoric Indian Camp Should Be Inspected by Tribal Elders and Leaders.⁶⁸ (Ref. Pet. at 21).

In admitting Contention C, the Board erred in two key respects. First, the Board based its decision on an erroneous interpretation of the consultation requirements of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.*, and the obligations of the Applicant under 10 C.F.R. § 51.45, the implementing regulations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Second, the Board improperly admitted Petitioners' contention, contrary to 10 C.F.R. § 2.309(f)(1), without supporting documentation challenging the information provided by the Applicant regarding the prehistoric Indian camp. For the reasons explained in this brief, the Board's decision to admit Contention C should be reversed.

A. The Board Incorrectly Applied the NHPA by Obligating the Applicant to Comply with the Consultation Requirements

In its decision, the Board erred by admitting a contention which alleges the failure of the Applicant to comply with the legal obligations imposed on the NRC. Notwithstanding the fact that NHPA imposes obligations only on a federal agency,⁶⁹ in this case, the NRC, the Board

⁶⁸ Petitioners based the claims on Section 2.4.1 of the TR and Section 3.8 and 4.8 of the ER.

⁶⁹ Section 106 of the National Historic Preservation Act requires in relevant part that [t]he head of any Federal department or independent agency having authority to license any undertaking shall, ... prior to the issuance of any license, ... take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation (continued. . .)

admitted a contention alleging that the actions taken by the Applicant were not in compliance with the relevant requirements of law. As the Staff argued in response to the petition, Petitioners' claim that "Oglala Sioux elders and leaders should be consulted immediately before any further action is taken..." Ref. Pet. at 22-23, does not explain or identify authoritative references that would obligate the Applicant to consult with the tribal leaders.⁷⁰

Although the Board recognized that the "primary duties" under the NHPA fall on the Staff, the Board erred when it applied 10 C.F.R. § 51.45, to show that "specific to this contention, section 51.45(d) requires the applicant to provide a list of all approvals and describe the status of those approvals with the applicable environmental standards and requirements." LBP-08-06 at 109. The approvals required under section 51.45(d) are from federal, state and local agencies with jurisdiction over other aspects of the applicant's operation under their regulatory authority. As a federal agency, NRC must comply with Section 106 of the NHPA.⁷¹ The NHPA imposes, among other things, certain consultation requirements on federal agencies, but does not, by itself, impose any requirements on applicants for NRC licenses. Regardless of an Applicant's efforts, the Staff is required to conduct the consultation process required under the NHPA.⁷² That consultation process will begin when the Staff begins its review.

(. . .continued)

established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking. See 16 U.S.C 470f.

⁷⁰ See NRC Staff Response to Petitions at 40. In subsequent pleadings and at oral argument, Petitioners explained that their contention focuses on the Staff's failure to consult with the tribal chiefs pursuant to the NHPA and the United Nations Declaration on the Rights of Indigenous Peoples. See Jan. 16 Tr. at 304-310, Owe Aku Reply at 15; Cook Reply at 16. The Staff responded, however, that any assertion that the NRC has violated its obligations under NEPA and the NHPA, including obligations to consult with Indian Tribes, is premature. See NRC Staff's Treaty Reply at 21.

⁷¹ 16 U.S.C. § 470f.

⁷² *USEC, Inc. (American Centrifuge Plant)*, LBP-05-28, 62 NRC 585, 622-23 (2005). The relationship between the NEPA and the NHPA was discussed briefly by the Commission in *USEC, Inc. (American Centrifuge Plant)*, 63 NRC 443 (2006). In *USEC*, the Commission found that "[a]ny contractual provision that purports to shift NHPA compliance from DOE to USEC cannot affect the NRC's statutory (continued. . .)

B. The Board Improperly Admitted Petitioners' Contention Without Supporting Documentation Challenging the Information Regarding the Prehistoric Indian Camp

In addition to its erroneous conclusions of law regarding the NHPA, the Board rejected Staff's argument that Petitioners presented no information challenging the Applicant's evaluation of the Indian camp or other potential historic properties in the application.⁷³ Petitioners' claim that "CBR is not qualified to make any determinations concerning the significance of the prehistoric Indian camp" is not supported by any facts and is not a challenge to the application wherein the Applicant states that "the Indian camp site was reported as being outside the assessment area" for North Trend.⁷⁴ The Commission has stated in previous decisions that the "contention requirements are deliberately strict, and the Commission will reject any contention that does not satisfy these requirements. In NRC practice, '[m]ere 'notice pleading' does not suffice.' Our rules call for 'a clear statement of the basis for the contentions and the submission of supporting information and references to specific documents and sources that establish the validity of the contention.'"⁷⁵ In this regard, Petitioners' contention is clearly inconsistent with the Commission's admissibility principles. While the Board fails to provide a clear explanation, the finding that "...with regard to the requirements of 10 C.F.R. § 2.309(f)(1), in addition to providing a specific statement of their contention and briefly explaining the bases for it...petitioner support it with a *fact-based argument* ...stating why they disagree with the

(. . .continued)

obligation to comply with the NHPA with respect to the licensing of the proposed action." *Id.* at 446. While the facts in USEC are different than the instant proceeding, the Commission's holding is applicable in this case because the Board decisively shifted responsibility of the consultation requirements of the NHPA to the license applicants. LBP-08-06 at 109.

⁷³ The Board noted an argument made by petitioners in oral argument that consultation is required under both NHPA and NEPA. LBP-08-06 at 106; Jan. 16 Tr. at 307.

⁷⁴ TR at 2.4-1; NRC Staff Response to Petitions at 41.

⁷⁵ USEC, CLI-06-9, 63 NRC at 436, 437.

applicant's actions and position", without requiring supporting documentation, is inconsistent with the contention admissibility requirements.

Based on the foregoing, the Board decision to admit contention C was in error and the Commission should reverse the decision.

V. The Board Erred in Admitting Contention E Because the Board Improperly Considered Foreign Ownership of the Applicant Within the Scope of this License Amendment Proceeding

As explained below, Petitioners' Contention E, as submitted in the original petitions, fails to meet the Commission's contention admissibility requirements because "the issue[s] raised in the contention is [not] within the scope of the proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

Petitioner's Contention E reads as follows:

Contention E: CBR Fails to Mention It is Foreign Owned by Cameco, Inc. So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There Is No Assurance The CBR Mined Uranium Will Stay In US Power Generation. (Ref. Pet. at 24).

The Board erred when it considered Contention E, finding that "Applicant's foreign ownership is potentially material to safety and environmental requirements of 10 C.F.R. Part 40," LBP-08-06 at 119, and asked for additional briefing.⁷⁶ The matter of whether the Applicant is owned by a Canadian company is irrelevant because the current proceeding is on an application to amend the license to allow in-situ leach uranium recovery at an additional location, and does not involve a change in ownership.⁷⁷ For these reasons, the Staff argued

⁷⁶ The Board requests additional briefs on whether issuance of a license amendment to the applicant would be in direct violation of 10 C.F.R. § 40.38; and (2) if not restricted under § 40.38, whether foreign ownership of the Applicant would, under Part 40, including § 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment." LBP-08-06 at 122.

⁷⁷ Additionally, the Commission's regulations set out that the scope of review be limited to the information presented in the license amendment application. Under 10 C.F.R. § 40.44, *Amendments of Licenses at the Request of the Licensee*, "...shall be filed on NRC form 313 in accordance with § 40.31 and shall specify the respects in which the licensee desires the license to be amended and the grounds for such amendment." Further, § 40.45, *Commission Action on applications to renew or amend*, states (continued. . .)

that whether CBR, an existing licensee, is foreign-owned is not material to the safety and environmental requirements related to an additional in-situ leach uranium recovery operation. Staff Response to Petitions at 43. Because the composition of the ownership is not changed, it is not relevant to this proceeding.⁷⁸ While the Board notes that Petitioners are challenging the Applicant's acquisition by a foreign-owned company, in reality Cameco, Inc., has been an owner of CBR since at least 1998 (Accession No. 9805260014).⁷⁹ The long-standing foreign ownership of the applicant is not an issue raised by this license amendment.⁸⁰

(. . .continued)

that the Commission will apply "... the applicable criteria set forth in § 40.32." This requires that the Commission apply only those criteria in § 40.32 that are applicable to the amendment.

⁷⁸ Petitioners' other claims, stated in the Board's decision, LBP-08-06 at 118-19, that the Applicant provides no assurance that the ISL mining product, yellowcake uranium "will not be used for nuclear weapons of a foreign country or terrorists or fall into the hands of such enemies of the [U.S.]" were not provided as a bases in Petitioners' original contention, but presented in the "Relevant Facts" section of the Reference Petition without identifying the applicable contention. Ref. Pet. at 2. Additionally, the Board's decision, LBP-08-06 at 118, stated that Petitioners' claims challenging the Staff and the Applicant's silence on "how it would [be] in furtherance of the protection of the health and safety of the public to grant foreign-owned applicant's amendment to expand to the North Trend area" was not in the original contentions, but presented in the Cook Reply to NRC. Cook Reply to NRC at 15. No additional information or supporting documentation was provided to support any of the aforementioned statements. Petitioners also failed to file an amendment to their contentions under 10 C.F.R. § 2.309(c).

⁷⁹ As a matter of information, in accordance with 10 C.F.R. § 40.46, Crow Butte Resources, Inc. reported to the Staff that Cameco, Inc. was entering into an agreement to purchase all shares of Uranex USA, Inc., a shareholder of CBR, Inc. In that letter, CBR requested consent in meeting notification requirements of section 40.46. In a response dated June 5, 1998, the Staff consented to the proposed change and determined that no license amendment was necessary. (Accession No. 9806120319). These documents are available in the NRC Public Document Room.

⁸⁰ As a matter of information, to the extent that the Petitioners' contention raises concerns about resources leaving the country, any subsequent export of this material would be subject to 10 C.F.R. Part 110, which provides, among other things, for general and specific licenses to export source material to countries not prohibited under 10 C.F.R. § 110.28 and destinations restricted under 10 C.F.R. § 110.29. The licensing program under 10 C.F.R. Part 110 is a separate licensing proceeding with its own process and procedures and should not be confused with the Part 40 source materials licenses to possess and use source material domestically.

In addition, the Board committed an error in its legal analysis and conclusions regarding foreign ownership provisions in Section 103(d) of the Atomic Energy Act (AEA), 42 U.S.C.

§ 2133. Specifically, the Board found that

[t]he language of the Act [section 103(d)] and in 10 C.F.R. § 40.38 appears to be more or less straightforward. It would seem that the type of license Crow Butte has and wishes to amend is a “commercial license,” which would seem to render its foreign ownership prohibitive of its being granted a license under the Act. We are not aware of a definition of the term, “Commercial License,” but this would seem to be fairly straightforward.

LBP-08-06 at 120.

These conclusions are incorrect because Section 103(d) of the AEA is applicable to production and utilization facilities, such as nuclear reactors and facilities that use or produce special nuclear material, but does not apply to Part 40 source materials licenses to possess and use for in-situ leach uranium recovery facilities. Further, any application of 10 C.F.R. § 40.38, which is the centerpiece of the two questions for which the Board is requesting additional information, is also misplaced because the prohibition of ownership by a foreign corporation contained in section 40.38(a) applies specifically to the United States Enrichment Corporation (USEC) or its successors.⁸¹ Thus, the legal authority cited in the Board’s discussion is neither applicable nor instructive in the current proceeding.

Based on the nature of the application at issue, it is clear that the additional information requested by the Board regarding foreign ownership is not within the scope of the proceeding. Further, in light of the Board’s misinterpretation of the applicable law and regulations concerning

⁸¹ Section 40.38 was promulgated under the USEC Privatization Act (“Act”) to amend the Atomic Energy Act of 1954. The Commission’s final rule in response to that Act explicitly provides that section 40.38 is a regulation specifically applicable to USEC or uranium enrichment facilities. See USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6,663, 6,664 (February 12, 1997). The rule specifically provides that in 10 C.F.R. § 40.4, “Definitions,” the term “Corporation,” which is found in section 40.38, refers to the licensing of the Corporation (USEC) or its successor for operation of the AVLIS facility or uranium enrichment facilities. *Id.* at 6,664. The final rule also states that 10 C.F.R. § 40.38 was added in response to the Act. *Id.* at 6,666.

foreign ownership, the additional information requested by the Board is not relevant to in-situ leach uranium recovery licensees. In light of the foregoing explanation, while the Board may request additional information as part of its duties as an adjudicator, the Staff believes the inquiry need not go any further. Contention E has no basis in law or fact and is ripe for rejection.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission reverse the Board's decision granting a hearing to Petitioners WNRC, Owe Aku, and Debra White Plume.

Respectfully submitted,

/RA by Andrea' Z. Jones/

Andrea Z. Jones
Counsel for NRC Staff

/RA by Marcia J. Simon/

Marcia J. Simon
Counsel for NRC Staff

Dated at Rockville, Maryland
this 9th day of May, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
CROW BUTTE RESOURCES, INC.)	Docket No. 40-8943
In-Situ Leach Facility, Crawford, Nebraska)	
)	ASLBP No. 07-859-03-MLA-BD01
(License Amendment for the North Trend)	
Expansion Project))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S NOTICE OF APPEAL OF LBP-08-06, LICENSING BOARD'S ORDER OF APRIL 29, 2008, AND ACCOMPANYING BRIEF" in the above-captioned proceeding have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 9th day of May, 2008:

Administrative Judge * **
Ann Marshall Young, Chair
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: AMY@nrc.gov

Administrative Judge * **
Richard F. Cole
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: RFC1@nrc.gov

Administrative Judge **
Frederick W. Oliver
10433 Owen Brown Road
Columbia, MD 21044
E-mail: FWOLIVER@verizon.net

Bruce Ellison, Esq. **
PO Box 2508
Rapid City, SD 57709
belli4law@aol.com

Office of the Secretary * **
Attn: Rulemakings and Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16 G4
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Debra White Plume **
P.O. Box 71
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

Office of Commission Appellate
Adjudication * **
Mail Stop: O-16 G4
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: OCAAmal@nrc.gov

Owe Aku, Bring Back the Way **
Attn: Debra White Plume
P.O. Box 325
Manderson, SD 57756
E-mail: LAKOTA1@gwtc.net

David Frankel, Esq. **
P.O. Box 3014
Pine Ridge, SD 57770
Email: arm.legal@gmail.com

Thomas Kanatakeniate Cook **
1705 S. Maple Street
Chadron, NE 69337
E-mail: tcook@indianayouth.org

Slim Buttes Agricultural Development
Corporation **
Attn: Thomas K. Cook
1705 S. Maple Street
Chadron, NE 69337
E-mail: slmbttsag@bbc.net

Western Nebraska Resources Council **
Attn: Buffalo Bruce
P.O. Box 612
Chadron, NE 69337
E-mail: buffalobruce@panhandle.net

Mark D. McGuire, Esq. **
McGuire and Norby
605 South 14th Street, Suite 100
Lincoln, NE 68508
E-mail: mdmsjn@alltel.net

Tyson R. Smith, Esq. **
Winston & Strawn LLP
1700 K St. NW
Washington, DC 20006
E-mail: trsmith@winston.com

Crow Butte Resources, Inc. **
Attn: Stephen P. Collings
141 Union Blvd., Suite 330
Lakewood, CO 80228
E-mail: steve_collings@cameco.com

Johanna Thibault **
Board Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
E-mail: JRT3@nrc.gov

Mario Gonzalez, Esq. **
Elizabeth Maria Lorina, Esq. **
522 7th Street, Suite 202
Rapid City, SD 57701
E-mail: elorina@gnzlawfirm.com

Harold S. Shepherd, Esq. **
Center for Water Advocacy
90 W. Center St.
Moab, UT 84532
E-mail: waterlaw@uci.net

Marc A. Ross, Esq. **
Rock the Earth
1536 Wynkoop St., Suite B200
Denver, CO 80202
E-mail: marcr@rocktheearth.org

/RA by Marcia J. Simon/

Marcia J. Simon
Counsel for NRC Staff