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May 9, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CROW BUTTE RESOURCES' NOTICE OF APPEAL OF LBP-08-06

Pursuant to 10 C.F.R. § 2.311(a) and (c), Crow Butte Resources, Inc. files this Notice of Appeal of the Atomic Safety and Licensing Board's April 29, 2008, Memorandum and Order, which, among other things, admitted for litigation in the above captioned proceeding three contentions related to Crow Butte's license amendment application for the North Trend Expansion Area, together with the attached Brief.

Respectfully submitted,

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RESOURCES, INC.

Dated at Washington, District of Columbia
this 9th day of May 2008

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CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-06

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RESOURCES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REGULATIONS

May 9, 2008

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In the Matter of:	)	
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I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), Crow Butte Resources, Inc. ("Crow Butte" or "Applicant") hereby appeals the Atomic Safety and Licensing Board's ("Board") decision on standing and contentions (LBP-08-06), dated April 29, 2008. That decision concerns an application by Crow Butte for an amendment to its existing license that would permit expansion of an existing in situ uranium recovery ("ISR") operation. The Board concluded that certain petitioners had demonstrated standing in the proceeding, and also that they had offered three admissible contentions. For the reasons discussed below, we disagree and urge the Commission to reverse the Board decision on standing and admissibility. The request for hearing and petition to intervene should be wholly denied.

In a consolidated hearing request, the petitioners provided no documented evidence or testimony to support their assertions that expanded uranium recovery operations would cause them any harm. Petitioners failed to demonstrate an injury-in-fact that could be redressed by a favorable decision. Instead, the Board compiled a series of increasingly improbable suppositions — including some that border on the physically impossible — to

support a standing determination. This type of analysis has been repeatedly rejected by the Commission and by reviewing courts as a basis for standing.

The proposed contentions also should have been rejected. In its application, Crow Butte provided substantial evidence that the expansion would not lead to significant offsite environmental impacts. Petitioners, however, simply referenced sections of the amendment application and stated only that they disagreed. These bald and conclusory averments are inadequate to support an admissible contention. Even a last-minute exhibit (given to the NRC Staff and Applicant at the prehearing conference), which the Board affords substantial weight, does not provide any new or relevant information that would support an admissible contention. Instead, the exhibit merely highlights the need for additional information to support a regulatory review *by the State of Nebraska* that is based on different criteria from the NRC's regulations in 10 C.F.R. Part 40 and requires different findings. The preliminary comments of a State agency do not carry any special status in NRC proceedings, and a mere reference to unanswered questions alone does not make an admissible contention. Petitioners must provide specific factual or expert support for the contentions and must adequately explain the significance of the information presented (*i.e.*, how it provides a basis for the contention).

Ultimately, the Board created and applied novel standards for both standing and contentions that have no legitimate legal or regulatory basis. Accordingly, the Commission should reverse the Board's findings on standing and the three admitted contentions.[1]

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[1] This proceeding involves the first of up to 31 applications for ISR or Part 40 facilities expected within the next few years. The Commission in this case should clearly re-affirm the type of injury and causal links needed to support standing for ISR proceedings, and put future parties on notice that conclusory and poorly-supported contentions will not be admitted. Allowing petitioners to participate in hearings without providing adequate factual or documentary support for their petition could undermine the contention admissibility standard, and lead to unnecessary and protracted litigation. And, given the

II. FACTUAL BACKGROUND CONCERNING CROW BUTTE'S APPLICATION FOR THE NORTH TREND EXPANSION

Crow Butte is currently licensed to operate an in-situ recovery uranium recovery facility in Crawford, Nebraska. On May 30, 2007, Crow Butte requested an amendment to its license that would allow the development of a satellite facility, the "North Trend Expansion Area," near its existing ISR operation. Letter from Stephen P. Collings to Charles L. Miller dated May 30, 2007 (ADAMS ML0715500570). The amendment request included a Technical Report ("TR") and an Environmental Report ("ER"). A notice of an opportunity to request a hearing or petition to intervene was posted on the NRC website on September 13, 2007, with a deadline for filing requests for hearing of November 12, 2007.

On November 12, 2007, NRC received by e-mail timely petitions from the following individuals and organizations: (1) Debra White Plume, (2) Thomas Cook, (3) Owe Aku/Bring Back the Way ("Owe Aku"), (4) Chadron Native American Center, (5) High Plains Development Corporation, (6) Slim Buttes Agricultural Development Corporation, and (7) Western Nebraska Resources Council ("WNRC"). The petitioners proposed six contentions (Contentions A through F). Crow Butte and the NRC Staff filed responses on December 6 and 7, 2007, respectively.

On December 28, petitioners filed supplemental standing affidavits and a consolidated version of the original petitions — the "Reference Petition" (hereinafter "Pet"). Both Crow Butte and NRC Staff filed objections to the supplemental affidavits on January 4, 2008. Owe Aku requested two additional weeks to provide additional affidavits, and the Board granted an extension until January 11, 2008. The Board heard oral argument on petitioners' standing and contentions on January 16, 2008. During argument, counsel for petitioners

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number of expected applications, inadequate threshold inquiries could overwhelm the NRC's licensing process.

proffered two documents, referred to as Exhibits A and B, in support of petitioners' standing and as additional bases for Contentions A and B.[2]

The Board in an Order dated January 24, 2008, set deadlines for Crow Butte and the NRC Staff to file responses to the newly-filed exhibits, as well as for a series of additional briefs on issues raised *sua sponte* by the Board. First, on January 30, Crow Butte provided the Board with citations to international agreements on non-proliferation and the NRC Staff filed citations regarding the need for an opportunity for a hearing on materials license transfers and amendments. Then, Crow Butte and NRC Staff filed their responses to the new exhibits on February 8, and petitioners jointly filed a combined reply to these on February 15, 2008. Next, the parties filed briefs addressing the import of the Fort Laramie Treaties of 1851 and 1868, and the United Nations Declaration of Right of Indigenous Peoples, "insofar as [they] may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts," on February 21 and 22. Responses were filed on February 29. In addition, on February 22, the Board received two briefs *amicus curiae*, with motions for leave to file the same, one from the Oglala Sioux Tribe, and one from the Center for Water Advocacy (CWA), Rock the Earth, and Mr. Robert Lippman. Crow Butte and the NRC Staff filed responses opposing these motions on March 3; movants CWA *et al.* filed a reply on March 10; and Crow Butte filed a letter opposing the reply on March 13, 2008.

The Board issued its decision on standing and contentions on April 29, 2008. The Board reframed and admitted Contentions A, B, and C, and rejected Contentions D and F. The Board's evaluation of the petitioner's standing and the admitted contentions is discussed further

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[2] Tr. at 65-66, 87-88; Email from Hannan LaGarry to buffalobruce@juno.com *et al.* (Jan 14, 2008) (Subject: geology summary) [hereinafter Exhibit A]; Letter from Steven A. Fischbein to Stephen P. Collings (Nov. 8, 2007), with attached NDEQ Detailed Technical Review Comments [hereinafter Exhibit B].

below. As for Contention E,[3] the Board noted that it intends to direct supplemental briefing and hold oral argument.[4] The Board also reserved judgment on whether the proceeding should be held under the procedures of 10 C.F.R Part 2, Subpart L (the default procedures for this type of proceeding), or under Subpart G's formal adjudicatory procedures.

III. STANDARD OF REVIEW

A. Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission's regulations in 10 C.F.R. § 2.309(d)(1) provide that a request for hearing or petition to intervene must state:

> (i) The name, address and telephone number of the petitioner;
> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right. *Yankee*

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[3] Contention E states: "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 for Power Generation." Pet., at 24.

[4] Crow Butte and the NRC Staff both argued that the ownership issue is outside the scope of the license amendment proceeding based on the fact that there is no change in ownership associated with the amendment application. The Licensing Board disagreed. LBP-08-06, slip op. at 119. The Board apparently found that 10 C.F.R § 40.38, which only applies to USEC, and Section 103(d) of the Atomic Energy Act, which applies only to production and utilization facilities, create sufficient uncertainty to warrant further briefing. Despite the pendency of proposed Contention E, this appeal is timely at a minimum because a reversal of the decision with respect to standing would resolve the proceeding.

Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To establish standing, there must be an "injury-in-fact" that is either actual or threatened. *Id., citing Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). Although the presiding officer is to "construe the [intervention] petition in favor of the petitioner" in making a standing determination, *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995), the injury must nevertheless be "concrete and particularized," not "conjectural" or "hypothetical." *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). As a result, standing will be denied when the threat of injury is too speculative. *Id.* Furthermore, the alleged "injury-in-fact" must lie within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.* ("NEPA"). *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998).

Further, a petitioner must establish a causal nexus between the alleged injury and the challenged action. *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). A determination that the injury is fairly traceable to the challenged action depends, in part, on whether the chain of causation is "plausible." *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75. Judicial and Commission standing jurisprudence requires "realistic threat ... of direct injury." *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001).

Finally, a petitioner must establish redressibility — that is, that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

The Commission has also addressed standing in a materials license *amendment* proceeding and held that a petitioner must show that the amendment will cause a "'distinct new harm or threat' apart from the activities already licensed." *White Mesa*, CLI-01-21, 54 NRC at 251; *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 192 (1999). Moreover, the petitioner must show a "plausible chain of causation" for the new and distinct harm; conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251; *Zion*, CLI-99-4, 49 NRC at 192.

In materials licensing cases, there is no automatic presumption of standing based on geographic proximity. Rather, in materials cases, "a presumption of standing based on geographical proximity may be applied . . . where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences." *Georgia Tech,* CLI-95-12, 42 NRC at 116 (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n. 22). Whether a proposed action carries with it an "obvious potential for offsite consequence," and, if so, at what distance a petitioner can be presumed to be affected, must be determined "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source." *Id.*; *see also Exelon Generation Co., LLC and PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 and 3), CLI-05-26, 62 NRC 577, 580 (2005). In particular, how close a petitioner must live to the source "depends on the danger posed by the source at issue." *Sequoyah Fuels Corp.*, CLI-94-12, 40 NRC at 75 n. 22.

An organization may demonstrate standing by showing "either immediate or threatened injury to its organizational interests or to the interests of identified members." *Georgia Tech*, CLI-95-12, 42 NRC at 115. For an organization to assert "representational

standing" on behalf of one or more of its members, the organization "[m]ust demonstrate how at least one member may be affected by the licensing action, must identify that member by name/address, and must show that the organization is authorized to request a hearing on that member's behalf." *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 37, 47 (2000).

B. Admissibility Of Contentions

To gain admission to a proceeding as a party, a petitioner must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). Section 2.309(f)(1) imposes the following requirements:

> A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; and
>
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a

relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

The contention rule is "strict by design," *Dominion Nuclear Conn., Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), and failure to comply with any of the above requirements is grounds for dismissal of a contention. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Louisiana Energy Servs.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54 (2004). The Commission's procedures do not allow "'the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support." *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), *quoting Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). Likewise, Commission practice does not "permit 'notice pleading,' with details to be filled in later." *Id.*

To be admissible, contentions must fall within the scope of the proceeding as defined by the notice of hearing. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *LES*, LBP-04-14, 60 NRC at 55. Moreover, a contention must present a genuine dispute with the applicant on a material issue of law or fact, and any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). The petitioner must present the factual information and expert opinions necessary to support its contention adequately. *See Georgia Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Neither mere speculation nor bare assertions alleging that a matter should be

considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner. *See Georgia Tech*, LBP-95-6, 41 NRC at 305.

IV. GROUNDS FOR REVERSAL OF THE BOARD'S DECISION ON STANDING AND CONTENTIONS

For the reasons set forth below, the Board's conclusions relative to standing and admissibility of contentions are erroneous. The Commission should reverse the Board in all respects based on a misapplication of the Commission precedent on standing and the petitioners' failure to satisfy the Commission's strict standards for admissibility of contentions.

A. None Of The Petitioners Have Demonstrated Standing

As an initial matter, a standing determination is not an assessment of the merits of the petitioner's arguments. LBP-08-06, slip op. at 41. Nevertheless, a petitioner must demonstrate that the alleged the injury is "concrete and particularized," not "conjectural" or "hypothetical." The petitioner must also show that the amendment will cause a "'distinct new harm or threat' apart from the activities already licensed," as well as a "plausible chain of causation" for the new and distinct harm. *White Mesa*, CLI-01-21, 54 NRC at 251. Conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. *Id.* Judicial and Commission standing jurisprudence requires "realistic threat ... of direct injury." *Id.*, at 254.

As a result, a standing inquiry includes a threshold, fact-based question as to whether the alleged injury and causation are realistic or even plausible. Contrary to the Board's analysis, LBP-08-06, slip op. at 40-41, this inquiry must include an assessment of matters such as "the geological makeup of the area, the direction of flow, and the time it takes for water to

flow a certain distance." Without an understanding of these basic factors, a Board cannot properly assess whether an alleged injury or causal chain is realistic. This is particularly true where, as here, there is no contrary factual or expert information to "construe" in favor of the petitioner. As is discussed below on contention admissibility, petitioners simply "disagree" with the conclusions of the applicant's ER and TR, but offer no competing assessment of the facts (*e.g.*, the time for water to flow a certain distance, flow direction, geology). In the absence of any information calling into question the data and conclusions in the application, petitioners fail to demonstrate either a concrete, non-hypothetical injury or a plausible chain of causal events.

1. Standing of Petitioner WNRC

In LBP-08-06, the Board based its finding of standing for WNRC on the affidavit of Dr. Francis E. Anders, who lives about one mile from the current CBR mining operations. According to the affidavit, Dr. Anders and his family use a well on his property for drinking, bathing, irrigation, and stock water. Dr. Anders stated that he has "observed a bad odor emanating from my well water which was not present before [CBR] began drilling about one (1) mile from [his] well in Fall 2007" and "observed that since CBR started drilling near my well in Fall 2007, there is a weekly cycle during which the CBR crew starts on Monday and by Wednesday, my well water becomes discolored, and the CBR crew quits on Friday and by Monday morning, my well water is clear again." Affidavit of Francis E. Anders (Dec. 28, 2007). He also argued that he noticed an increase in the amount of sand in his water filter and in his toilet which he "believe[s]" is due to the lowering of the water table. *Id.*

In finding standing, the Board based its decision on two fundamental misconceptions. First, the Board mistakenly relied on alleged injuries from current operations to find standing for proposed activities in the North Trend Expansion Area. In a materials license amendment proceeding, the Petitioner must show that the amendment will cause a "'distinct new

harm or threat' apart from the activities already licensed." *White Mesa*, 54 NRC at 251. Moreover, the petitioner must show a "plausible chain of causation" for the new and distinct harm; conclusory allegations that are not tied to the specific amendment at issue are insufficient to establish standing. *White Mesa*, 54 NRC at 251. As courts addressing standing in NEPA cases have noted, "standing in an EIS matter focuses on whether [parties] have shown a particularized environmental interest of theirs that will suffer *demonstrably increased risk.*" *Fla. Audubon Society v. Bentsen*, 94 F.3d 658, 665 (1996) (emphasis added).

Here, the standing affidavit does not even aver that the expansion — as opposed to the current operation — will cause any harm, much less a new and distinct harm. And, a "causal" chain between the existing operations and a proposed expansion several miles away is not mentioned, or even fairly implied. Instead, the alleged harm rests entirely on the existing operations (*e.g.*, there could be no lowering of the water table based on the proposed operations).

Further, the redressibility element of standing requires a petitioner to show that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001). An injury based on current operations will not be redressed by a decision to deny the license amendment application. Thus, none of the standing elements have been met.

Second, the Board mistakenly applied what is, in effect, a "proximity-based" presumption in finding standing without conducting the analysis required under Commission precedent. The Board determined that "the close proximity of the Anders well to the boundary of the proposed expansion site . . . seriously undercuts Staff's and Applicant's arguments." LBP-08-06, slip op. at 45. However, the petitioner must show a "plausible chain of causation," which, in turn, must be based on an assessment of the likelihood of a series of events occurring.

Here, the geologic, hydrologic, and geographic differences between the current mining area and the North Trend Expansion undermine any claims of plausible injury or causation. While Dr. Anders states that the current operations have impacted his well, he does not state which aquifer his well is located in or the depth of the well. Dr. Anders provides no information to show that his well was properly constructed to prevent impacts from other activities that may be taking place in the aquifers that overlay the mining unit.[5] Nor does he provide any data to show an increase in sulfides (odor) or turbidity (sand) from current operations or a change in the water table.

The absence of a plausible causal relationship to current operations is further underscored by factors dismissed or ignored by the Board. Crow Butte conducts its uranium recovery operations on an ongoing basis (effectively 24/7) and does not change the well flow rates on a weekly or regular basis. Moreover, the monitoring wells in the Basal Chadron,[6] which lie between the existing mining area and the Anders well, do not indicate water quality changes. Thus, there is no reason to presume that the weekly fluctuations alleged in the standing

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[5] For example, there may be other commercial or agricultural activities in the area that occur during the normal work week that draw water from the aquifers overlying the mining unit. If the well casing was not properly completed or installed correctly, then the observed impacts could be the result of activities wholly unrelated to Crow Butte's current operations. There are several, relatively straightforward methods for testing wellhead integrity, but no such test results were discussed in the standing affidavit.

[6] The standing declaration does not specify the aquifer from which the well draws water, although, based on water quality data, it is likely the Basal Chadron. The Basal Chadron ("basal" means base) is the aquifer in which uranium recovery operations are conducted. It lies just above the Pierre Shale, which acts as a lower confining unit. TR, at 2.6-9. A confining unit is a layer of sediment or lithologic unit of low permeability that effectively bounds an aquifer. Above the Basal Chadron lies the Middle Chadron (the upper confining unit), then the Upper/Middle Chadron, then the Upper Chadron (another confining unit). Above the Upper Chadron lies the Brule. The Arikaree Formation, which become the High Plains Aquifer, is not present at the site as it does not begin for several miles to the east of both the existing and proposed operations.

declaration are caused by the recovery operations at the existing wellfield, much less remedied by a denial of the amendment request. And, the anecdotal, non-specific averments of "injury" and causation in the affidavit are contradicted by other information and data. For example, a comparison of baseline water quality data taken 25 ago from the Anders well to water quality data taken in the last year shows no difference in water quality. Tr., at 160. Further, water from a well that intersects the Basal Chadron would be expected to have a bad odor because of the naturally high levels of sulfur compounds. TR, at 2.2-25 (Table 2.2-11). The injury and causation are conjectural and thus insufficient to support standing. *White Mesa*, 54 NRC at 253.

With regard to proximity, the Board noted that the North Trend Expansion is more than 1.5 miles from the proposed expansion area — 50% further than from existing operations. This not a trivial distance when the flow rate in the Basal Chadron is roughly 10 feet/year. Tr. at 156-157. In addition to being farther away horizontally, the elevation of the mining unit at the North Trend Expansion Area is such that the Anders well would be several hundred vertical feet above the mining units in the North Trend. Tr. at 158; ER, at Fig. 3.4-13 (north-south cross-section D2-D2'). Most importantly, however, is the fact that the flow direction in the Basal Chadron in the North Trend Area is generally *away from* Dr. Anders well. ER, at 3.4-96 (eastward flow). The harm alleged in the Anders affidavit would require contamination to travel a distance of 1.5 miles horizontally in an aquifer with a flow rate of 10 feet/year and flow several hundred feet vertically — against the natural groundwater flow direction. This is unrealistic and implausible, even before recognizing that such contamination would have to result from an uncontrolled excursion in the wellfield that was not captured by either the upper, lower, or mining unit monitoring wells or remediated. At bottom, a realistic assessment of local hydrology all but eliminates any possibility of an impact from North Trend.

Based on the above, the current circumstances are similar to those in *White Mesa*. There the Commission declined to find standing even though the petitioner provided an expert affidavit concerning undetected potential leakage from the site. The Commission determined that, because the expert failed to establish a mechanism or pathway for contamination of groundwater used by petitioner, the injury and causation were "unfounded conjecture." *White Mesa*, CLI-01-21, 54 NRC at 253; *see also Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.[7] Here, we have only anecdotes related to the existing, not proposed, operations and no assessment of possible flow paths that could potentially permit the transfer of material from the North Trend Expansion Area to the Anders well. There are no expert affidavits supporting the standing declaration and the affidavits themselves do not even aver a link between the proposed new operations and any actual or threatened injury. This omission is especially glaring in light of the significant and uncontroverted information in the application.

To constitute an adequate showing of injury-in-fact, "pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action." *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-15, 53 NRC 344, 349 (2001), *citing United States v. SCRAP*, 412 U.S. 669, 688-89 (1973). Given the non-specific, unsupported nature of the injury, the speculative and conjectural nature of causation, and the absence of redressibility, standing for WNRC based on Dr. Ander's affidavit should be denied.

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[7] In *Sequoyah*, the Commission found that petitioners had standing based on injuries due to groundwater contamination. Unlike the instant case and *White Mesa*, however, the individual standing affidavit in that case was accompanied by an expert declaration from a professional hydrogeologist who examined data regarding the flow paths of groundwater in the area and provided examples of flow paths that lead from the site toward the petitioner's well. *Id.*

2. *Standing of Petitioner Owe Aku*

The Board also found standing for David Alan House, which in turn provided the necessary standing for Owe Aku. However, standing for Mr. House is even more problematic than for Dr. Anders. First, Mr. House indicates he resides outside Crawford, "approximately 8 miles south south-west of the [CBR] mining operation and proposed expansion" and that he consumes water from a well on his property that he understands draws from the Brule Aquifer. House Aff., at 1. As an initial matter, this places the current operations *between* his house and the proposed expansion. In order for there to be any groundwater impacts at Mr. House's well, contamination would need to travel more than 8 miles laterally and several hundred feet vertically — against the natural flow direction of the groundwater. ER, at 3.4-96 (eastward flow); ER, at Fig. 3.4-13. Again, this is unrealistic and based on pure conjecture. Further, his well is in the Brule aquifer, which is hydraulically separated from the Basal Chadron based on water quality data (Table 3.4-13b), potentiometric levels (ER, at 3.4-76; ER, at 3.4-96), pump test results (ER, at 3.4-79), borehole and geophysical logs (*e.g.*, presence of clays) (Figures 3.4-8 to 3.4-14), and physical distance (250 to 500 feet of soil) (Figures 3.4-8 to 3.4-14).

Against this uncontroverted factual information, the standing affidavit states only that Mr. House is "concerned" about the water in his well. Mr. House provides no information regarding a new or distinct harm from the proposed operations. As the Commission has repeatedly stated, conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. Mr. House alleges no specific harm at all — just a "concern" about groundwater.

In order to establish standing, a petitioner must show that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). As the Commission's jurisprudence makes clear, a petitioner must

demonstrate that the alleged the injury is "concrete" not "conjectural" or "hypothetical." Judicial and Commission standing jurisprudence requires "realistic threat ... of direct injury." *White Mesa*, CLI-01-21, 54 NRC at 251. In *White Mesa*, the Commission declined to find standing even though the petitioner provided an individual's affidavit alleging exposure to contaminated groundwater and an expert affidavit concerning undetected potential leakage from the site. The Commission noted that the petitioners failed to outline a pathway or mechanism for the leachate from the tailings pile to contaminate groundwater used by petitioners. *Id.*, at 254. The current circumstances are even more attenuated. There are no expert affidavits supporting the standing declaration and the affidavits themselves do not even aver a link between the proposed new operations and an actual or threatened injury. *See* House Affidavit, at 1 (making no connection between a well in the Brule and Crow Butte's proposed expansion, which would operate in the Basal Chadron). In short, the affidavit is devoid of information regarding injury or causation that could be used to support standing based on groundwater impacts.

With regard to surface water, Mr. House lives *upstream* of the proposed project. Mr. House does not aver that he uses the White River downstream or otherwise has any contact with surface water downstream from either the existing or the proposed operations. Thus, there is no injury to even trace to the proposed operation. *See Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 425-26 (1997) (declining to find standing in the absence of specific statements regarding the location and frequency of use).

Given the non-specific, unsupported nature of the injury, the speculative and conjectural nature of causation, and the absence of redressibility, standing based on Mr. House's affidavit should be denied.

3. Standing of Petitioner Debra White Plume

The Board also found that Debra White Plume established standing based on her affidavit, which states that she lives approximately 60 miles from the site and that she drinks water from a well that "draws water from an aquifer that *may* mix with the Chadron . . . or Brule aquifer in which CBR mines." White Plume Aff. at 1 (emphasis added). In her supplemental December 28, 2008 affidavit, she provides additional information, including that she and her family fish in the White River, which drains from the project area and then flows through the Pine Ridge Reservation. Presuming that she fishes at a location approximately 60 miles from the site and noting her reference to a past spill at CBR's existing operations, the Board found that Ms. White Plume had established standing. LBP-08-06, slip op. at 55.

Ms. White Plume's assertions concerning her family fishing in the White River are insufficient grounds for standing because she does not specify at what location on the river she fishes or the frequency with which this activity occurs. Even assuming that the fishing takes place on the Pine Ridge Reservation, which is at least 40 miles away from the proposed expansion site, her affidavit is insufficiently concrete to support standing. As one Licensing Board noted in a license amendment proceeding, a showing that there *may* be *some* offsite radiological impacts to someone is not enough to establish standing. *Atlas*, LBP-97-9, 45 NRC at 425-26.[8] In order to carry her burden, a petitioner must delineate the frequency and type of contacts. Otherwise, there is insufficient information to support a "concrete" injury. This is

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[8] In *Atlas*, the Board held that a petitioner has not shown any reasonable nexus between herself and any purported impacts when, despite assertions about potential facility-related waterborne radiological contacts, she has not delineated these with enough concreteness to establish an impact that is sufficient to provide standing. *Id.* By not providing any information that indicates whether water-related activities are being conducted upstream or downstream from a facility and by describing other activities only using vague terms such as "near," "close proximity," or "in the vicinity" of the facility at issue, the petitioner fails to carry the burden of establishing the requisite "injury in fact." *Id.*

especially true where, as here, there is no regular discharge or known source of contamination of the White River from Crow Butte's existing or proposed operations.

In addition, Ms. White Plume makes no allegations regarding potential release mechanisms — she does not mention surface water spills in her affidavit or reference any particular source of contamination. There is nothing in her affidavit to support a finding that Crow Butte's proposed operations will "cause" contamination. Although the Board places significant weight on a single, alleged spill at Crow Butte's existing operations in the mid-1990s, a historical event at the current operation is insufficient to support a finding of a "new and distinct" harm from the proposed expansion. Moreover, to prevent spillage into the White River at the new facility, Crow Butte will install berms and other mitigation measures (as it has done for the current operations). ER, at 4-9. The Commission has previously recognized that the berms can mitigate the potential for injury due to operations. *See White Mesa*, CLI-01-21, 54 NRC at 253 (noting, in denying petitioner standing, that groundwater impact is unlikely due to the presence of berms to contain moisture).[9] In the complete absence of a plausible mechanism for exposure, Ms. White Plume fails to satisfy the requirements for standing.

To the extent groundwater contamination was a basis for standing (LBP-08-06, slip op. at 55), the Board's determination should also be reversed. Statements in the affidavit regarding groundwater contamination are unsubstantiated and speculative. Ms. White Plume lives 60 miles from the site and draws water from an aquifer that does not even exist at Crow

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[9] In this regard, Ms. White Plume's allegations do not resemble those the Supreme Court found sufficient for standing in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000). In that case, it was "undisputed that ... unlawful conduct - discharging pollutants in excess of permit limits - was occurring at the time the complaint was filed" and nearby residents reasonably "curtailed" their use of the affected waterway (based on detailed affidavits regarding distance and frequency of use). *Id.* at 184-85. Here, there are no regular or ongoing discharges into the White River.

Butte. *See, supra*, note 6; *see also, infra*, note 14. Nothing in her affidavit suggests that contamination of her well water is physically possible, much less realistic.

In sum, Ms. White Plume simply does not provide information to support a concrete injury at such a remote location or otherwise provide a plausible basis for how this project will lead to contamination of the White River or her well.

B. Contentions A and B Are Not Admissible

To intervene in a proceeding a petitioner must, in addition to demonstrating standing, submit at least one contention meeting the requirements of 10 C.F.R. § 2.309(f)(1). Failure of a contention to meet any one of the requirements of § 2.309(f)(1) is grounds for its dismissal. *PFS*, 49 NRC at 325. The Commission has stated that the "contention rule is strict by design," having been "toughened . . . in 1989 because in prior years 'licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.'" *Millstone*, 54 NRC at 358. Nevertheless, the Board here has reframed, expanded, and admitted Contentions A and B despite significant flaws and failure to satisfy the requirements of § 2.309(f)(1).[10] Contentions A and B, as proposed and as redrafted and admitted by the Board are as follows:

> **Contention A (proposed).** 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.
>
> **Contention A (admitted).** 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

[10] Rather than admit or deny each contention based on the adequacy of individual bases, the Board re-framed the contentions such that they now broadly include any issue related to the description of the environment and its interaction with water (surface or groundwater). Instead of being narrow and focused on specific inadequacies identified in the petition, the admitted contentions are sprawling and ill-defined.

contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.

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

Contention B (admitted). 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.

Below, we discuss these two contentions together (as did the Board, for the most part) because they are based on the same flawed and unsupported statements.

In support of Contentions A and B, petitioners raise numerous allegations that are related to groundwater use and contamination. Even a cursory examination of the allegations, however, reveals that the issues are immaterial to these proceedings; not adequately supported with documentation or expert opinion; and/or not stated with sufficient specificity to support an admissible contention. Indeed, even the Board noted that the contentions are "less than perfectly articulated, and some lack an ideal level of support." LBP-08-06, slip op. at 95. The deficiencies are even more glaring upon examination of the individual bases for the contentions.

Throughout the petition, petitioners simply cut/paste excerpts of the ER/TR and then provide a conclusory statement with no factual or documentary support. Petitioners identify 25 different bases for their contentions (14 for Contention A, 11 for Contention B) — each of which has some variation of the same infirmity.[11] In many places, they raise issues that are clearly outside the scope of a license amendment proceeding. For example, petitioners begin by

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[11] Although page limits prohibit a comprehensive assessment of each individual basis, the NRC Staff's Combined Response to Petitions to Intervene, dated December 7, 2007, does a thorough job of assessing each basis individually and explaining its deficiencies with respect to the criteria in 10 C.F.R. § 2.309(f)(1).

stating that "NDEQ standards are used to create a 'restored' aquifer that is not really restored." Pet., at 10. Here, petitioners are challenging regulatory determinations of State agencies, which is not a matter at issue in a license amendment proceeding. Moreover, a challenge to an existing license condition (License Condition 10.3C) is impermissible in this proceeding. CBR does not propose to modify the license condition in this amendment application.

In other instances, petitioners simply repeat the information in the ER or TR. This approach does not establish a "genuine dispute." For example, petitioners quote the ER discussion on restoration goals, which states "[s]ince ISL operations alter the groundwater geochemistry, it is unlikely that restoration efforts will return groundwater to the precise water quality that existed before operations." Pet., at 10. But, the basis for the contention states only: "This shows that CBR knows that its restoration effort will not meet its proposed goals." *Id.* This is not a genuine dispute. In another basis, petitioners reference a discussion of regional groundwater hydrology in the ER that states that the Brule aquifer has a minimum hydraulic conductivity of less than 25 feet/day and notes the occurrence of and potential for fracturing. Pet., at 11. Petitioners state only that "CBR has evidence of fracturing but has made a judgment that it would not impact the designation of the Pierre as a lower confining unit below the Basal Chadron Sandstone — this is in contention."[12] A contention must directly controvert a position taken by the applicant in the application. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 342 (1999). Here, the petitioners simply parrot back the ER with no analysis, facts, or expert opinion that could be used to identify a genuine dispute. This is

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12 Another example is "[t]his shows CBR knows about water movement — and should know about movement of radioactive water amongst the aquifers." Pet., at 12. Again, there is no alleged dispute or any factual or evidentiary support for this basis.

exactly the type of unsubstantiated and unsupported allegation that the contention threshold standards were designed to prevent.

Finally, some bases in the petition are mischaracterizations of information in the ER and TR. For example, petitioners contend that the Laboratory Analysis Report for Brule Well W-78 shows arsenic levels rising from 0.005 to 0.006 to 0.007 in a few months in 1997 due to the existing ISL mining operations. However, the actual readings were 0.005, 0.003, 0.006, and 0.007. ER at 3.4-88. Thus, there was no continuous rise in the values, which are already in units of parts per million and just above detection limits. At those levels, the variation likely reflects seasonal variation or natural changes in water quality rather than an increase in arsenic levels due to a spill. In any event, they are low levels which are not indicative of contamination.

Ultimately, however, the Board did not rely much, if any, on the information submitted with the petition. Instead, the Board principally relied on Exhibit B. Exhibit B, which was not provided until the prehearing conference, is a letter from Steven Fischbein, Nebraska Department of Environmental Quality ("NDEQ"), to Crow Butte Resources dated November 8, 2007. The letter reflects comments from a *preliminary* review of Crow Butte's Aquifer Exemption Petition for the North Trend Expansion by the State of Nebraska. In the context of Nebraska's review, this document is analogous to an NRC Staff Request for Additional Information ("RAI"). Exhibit B alone is inadequate to support an admissible contention.

Under longstanding NRC practice, contentions must rest on the *license application*, not on NRC Staff reviews. *See Calvert Cliffs,* CLI-98-25, 48 NRC at 349-50; *Oconee*, CLI-99-11, 49 NRC at 336-39. The Commission has held that an RAI or an applicant's RAI response do not create a new opportunity for proposing contentions because contentions must be based on the application itself. Thus, to satisfy the Commission's contention rule,

petitioners must do more than "rest on [the] mere existence" of RAIs as a basis for their contention. *Calvert Cliffs*, 48 NRC at 350. Analogously, a contention cannot simply be based on a comments by a state agency regarding a permitting issue separate from the NRC's review, especially where the contention could have been drafted based on the original application and environmental report. Merely pointing to RAIs of another agency — in an entirely different regulatory context — is a far cry from the specificity the Commission's contention rule demands.

Here, to support Contentions A and B, petitioners point to the NDEQ RAIs without any supporting details. A contention alleging that an application is deficient must identify "specific portions of the application [ ] that the petitioner disputes and supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). Exhibit B simply reflects areas where NDEQ has made further inquiries. *Just because certain information was not submitted to NDEQ as part of the aquifer exemption application does not mean that information needed to be submitted to the NRC or even that it was not included in Crow Butte's NRC license amendment application.* Petitioner has an obligation to support contentions with "[d]ocuments, expert opinion, or at least a fact-based argument." *Oconee*, CLI-99-11, 49 NRC at 342. Apart from the broad reference to these follow-up questions posed by NDEQ Staff, the petitioners did not posit any reason or support of their own — no documentary evidence and no expert opinions — to indicate that the application is materially deficient.

Petitioners seeking to litigate contentions must do more than attach a list of RAIs and declare an application "incomplete." It is petitioners' responsibility to review the application, to identify what deficiencies exist, and to explain why. Providing a document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention, which requires specificity. *See Fansteel*, 58 NRC at

205. Exhibit B does not provide any analysis, discussion, or information of petitioners' own on any of the issues raised by NDEQ. There is no specific reference to Crow Butte's NRC application or to other NRC licensing documents. Failure to provide factual information and expert opinions regarding the bases of a proffered contention requires the contention be rejected. *See Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). Petitioners have done nothing more than point to NDEQ's preliminary reviews of the aquifer exemption petition. Exhibit B therefore cannot support an admissible contention.

The Board also apparently admitted Contentions A and B to the extent that they question hydraulic connectivity between aquifers and the potential for mixing among aquifers. LBP-08-06, slip op. at 97. However, in doing so, the Board fails to address any of the specific criteria for admitting a contention. If they had, then the lack of facts or expert opinion to demonstrate a genuine dispute would have been apparent. Petitioners stated only that "[they] do not believe that adequate confinement exists in light of admitted connectivity between the Brule and High Plains Aquifer,"[13] and that "CBR is assuming things about the structural feature – the White River Fault – related to the flow in the Basal Chadron Sandstone – which means that they don't know about how contained the radioactive fluid will be." Pet., at 12, 14. Both the bases lack documentary or expert support and do not raise an actual dispute with the application.

With regard to confinement, a mere "belief" is insufficient to support an admissible contention (*i.e.*, a genuine dispute), particularly where, as here, there is significant information in the application to show that confinement does exist between the Basal Chadron

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[13] Petitioners' reference to the High Plains Aquifer is inscrutable. The High Plains Aquifer is not mentioned in the TR/ER section cited in the petition. And, as discussed *infra*, note 14, the High Plains Aquifer does not even exist at the existing or proposed site.

and the Brule.[14] For example, the application includes water quality data (Table 3.4-13b), potentiometric levels (ER, at 3.4-76; ER, at 3.4-96), pump test results (ER, at 3.4-79), borehole and geophysical logs (*e.g.*, presence of clays) (Figures 3.4-8 to 3.4-14), and physical distance (250 to 500 feet of soil) (Figures 3.4-8 to 3.4-14) — all of which show that the Basal Chadron is hydraulically separated from the Brule. Petitioners have submitted no evidence, anecdotal or otherwise, to suggest a hydraulic connection between aquifers. And, a Board may not make assumptions of fact that favor the petitioner or supply information that is lacking. *Palo Verde*, 34 NRC at 155.

Likewise, regarding the White River structure, the petitioners do nothing more than point to the statement in the ER discussing the feature. Simply pointing to uncertainties — with nothing more — does not provide the specificity, facts, or expert opinions necessary to demonstrate a genuine dispute. NRC regulations do not require merely a showing of an "issue of fact" or even a "material issue of fact." Rather, Section 2.309(f)(1) requires a "genuine" issue of material fact. To be genuine, the factual record, considered in its entirety, must be enough in doubt so that there is a reason to hold a hearing to resolve the issue. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-46, 18 NRC 218, 223 (1983). Thus, just referencing the questions in Exhibit B — without an explanation of how the information calls into question (*i.e.*, raises a genuine dispute with) the conclusions in the

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[14] Remarkably, the Board does not even address the fact that the contention, which only alleges an absence of confinement between the Brule and the High Plains Aquifer, does not allege a hydraulic connection between the Basal Chadron (the mining unit) and Brule (which is separated from the Basal Chadron by several hundred feet in the North Trend). The High Plains Aquifer (also known as the Arikaree) *does not even exist* in the vicinity of the North Trend Expansion Area. The geologic structure that is the High Plain Aquifer does not begin for many miles to the east of the site. *See* Figure 3.3-1. Where the laws of physics deprive a contention of any credible or arguable basis, the contention should not be admitted. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 870 (1984), *aff'd*, ALAB-765, 19 NRC 645, 654 n.13 (1984).

application — is insufficient to support an admissible contention. Petitioners must allege deficiencies in the application and also indicate some significant link between the claimed deficiency and either the health and safety of the public or the environment. *Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002), *petition for review denied,* CLI-03-12, 58 NRC 185, 191 (2003).

Lastly, the Board also admitted the portion of the contention regarding "climate change." LBP-08-06, slip op. at 99-100. Petitioners' bases state that "[s]ince wind and water erosion are concerns, the importance of evaluating climate change is indicated," Pet., at 14; that "CBR fails to consider climate change, drought conditions and that Crawford's water supply comes from the White River and the North Trend project drains into the White River meaning that the community water supplies may be contaminated with radioactive waste from the CBR mine," *id.*, at 18; and that "TR 2.5.1, 2.5.3 fail to account for climate change and current drought conditions," *id.*, at 19. Yet, petitioners provide no "facts or expert opinions" that show that a "genuine dispute exists" with the application. A petitioner is not entitled to an evidentiary hearing on a bald allegation that a dispute exists. A petitioner must present sufficient facts or expert information to show a genuine dispute and reasonably indicating that a further inquiry is appropriate. Here, petitioners provide no information that climate change, the effects of which at any location are uncertain and speculative, would lead to a different or unanalyzed impact or that the impacts of climate charge are material to the amendment application at issue. Where, as here, that information is absent, a proposed contention is inadmissible for failure to meet of the requirements of § 2.309(f)(1).

C. Contention C Is Not Admissible

Petitioners' Contention C states: "Prehistoric Indian Camp Should Be Inspected by Tribal Elders and Leaders."[15] Pet., at 21-23. In support of Contention C, the petitioners allege two bases, each of which fails to present a genuine dispute with the Applicant on a material issue of fact or law. First, petitioners argue that "Oglala Sioux Tribe elders and leaders should be consulted immediately before any further action is taken that might interfere with the archaeological value of the prehistoric Indian Camp." *Id.*, at 23. However, petitioners produce nothing to suggest that any activities at the North Trend Expansion Area would impact the Indian Camp. Indeed, no impacts to the Indian Camp will occur because the Indian camp site is "outside the assessment area" for North Trend. TR at 2.4-1. Crow Butte does not even own or control the land on which the camp is located. In absence of even a hint as to how Crow Butte's actions might affect the camp, there can be no dispute with the application.

Second, petitioners claim "that CBR made a decision it was not authorized to make; to wit: that the prehistoric Indian site and nearby artifacts are not significant." Pet., at 21. But, petitioners fail to offer any support, factual or expert, to dispute the conclusions with regard to the camp site, which were actually made by a qualified archeologist and the Nebraska State Historic Preservation Officer. TR at 2.4-1. Accordingly, Contention C should be rejected.[16]

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15 As admitted by the Board, Contention C states "Reasonable consultation with Tribal Leaders regarding the prehistoric Indian camp located in the area surrounding CBR's proposed North Trend Expansion Project has not occurred as required under NEPA and the National Historic Preservation Act." LBP-08-06, slip op. at 110.

16 Although the Board seems to frame the argument as whether there was adequate consultation with regard to cultural resources, that was not the petitioners' contention. The proposed contention was focused solely on the Indian Camp and the mistaken assumption that the camp was discovered "at the North Trend site" and would be impacted by the expansion. Pet., at 21-23. As discussed above, the Indian Camp is outside the assessment area and is not located on land owned or controlled by Crow Butte. In any event, petitioners failed to provide any evidence or expert support to show

There is an additional, compelling reason for rejecting Contention C: a petitioner must establish standing for every single claim. Merely establishing standing for one claim does not grant a petitioner standing for all contentions. *See Laidlaw*, 528 U.S. at 706 ("Laidlaw is right to insist that plaintiff must demonstrate standing separately for each form of relief sought."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("[S]tanding is not dispensed in gross."); *Friends of the Earth, Bluewater Network Div. v. U.S. Dept. of Interior*, 478 F.Supp.2d 11, 16 (D.D.C. 2007) (holding that certain organizations challenging site-specific agency actions had limited or no standing because they did not identify a single member who could prove he had suffered injury-in-fact at particular parks); *L.A. v. Lyons*, 461 U.S. 95, 103, 106 (1983). Because the injuries relied upon by the Board for standing were related only to groundwater and surface water impacts, there is no asserted injury, causation, or redressibility associated with the Indian Camp. For this reason alone, Contention C should be rejected.

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that Crow Butte's actions were not reasonable. Crow Butte sent letters to thirteen tribes regarding the nature and proposed location of the project and made follow up telephone calls with each tribe. Tr. at 2.4-1. Although one tribal member called to find out more information about the project, the call related to water quality issues and not cultural resources. *Id.* At bottom, petitioners produced nothing to call into question the adequacy of the consultation. Thus, even if the proposed contention were about the reasonableness of consultation, it would not satisfy the contention admissibility standards in 10 C.F.R. § 2.309(f)(1) because it lacks factual or evidentiary support.

V. CONCLUSION

For the foregoing reasons, the Commission should reverse the Board's rulings relative to the determination of standing and the admissibility of contentions in LBP-08-06.

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Dated at Washington, District of Columbia
this 9th day of May 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-06" in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 9th day of May 2008. Additional e-mail service, designated by *, has been made this same day, as shown below.

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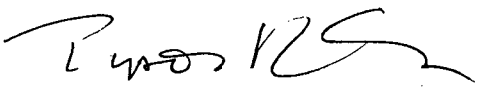

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