

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal)	)	

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APPLICANT'S RESPONSE TO PETITION TO  
INTERVENE FILED BY OGLALA SIOUX TRIBE

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August 22, 2008

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), Crow Butte Resources (“Crow Butte” or “the Applicant”) files this response to the request for hearing/petition to intervene (“Petition” or “Pet.”) filed on July 28, 2008, by the Oglala Sioux Tribe (“Petitioner”).<sup>1</sup>

For the reasons discussed below, the petition should be denied for failing to satisfy either the standing requirements set forth in 10 C.F.R. § 2.309(d) or the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, petitioner’s request for discretionary intervention fails to satisfy (or even address) the requirements under 10 C.F.R. § 2.309(e) and should be denied.

II. BACKGROUND

Crow Butte Resources, Inc. is currently licensed to operate an in-situ leach (“ISL”) uranium recovery facility near Crawford, Nebraska. On November 27, 2007, Crow Butte requested that the NRC renew its source material license. Ltr. from Stephen P. Collings to

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<sup>1</sup> “Request for Hearing and/or Petition to Intervene,” dated July 28, 2008.

Charles Miller (ADAMS ML0734706415). Specifically, the application requests that the U.S. Nuclear Regulatory Commission (“NRC”) renew Crow Butte’s current license for a 10-year period. If the NRC approves the renewal request, the approval will be documented in an amendment to NRC License No. SUA-1534. The proposed action is therefore license renewal, and not an initial license or an expansion of the existing facility.<sup>2</sup>

However, before approving the proposed amendment, the NRC must document its review in a Safety Evaluation Report and in a separate environmental review document. An NRC administrative review, documented in a letter to Crow Butte dated March 28, 2008, found the application acceptable to begin a technical review. Ltr. from William von Till to Stephen P. Collings (ADAMS ML080720341). A notice of opportunity to request a hearing was published in the *Federal Register* with a deadline for filing petitions of July 28, 2008.<sup>3</sup> On July 28, 2008, the petitioner timely filed a petition to intervene and request for hearing.

A. Standing Requirements

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;

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<sup>2</sup> 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” or “North Trend,” near its existing ISL operation. That license amendment application is the subject of a separate ongoing licensing proceeding and is not at issue in the license renewal proceeding.

<sup>3</sup> See “Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation,” 73 Fed. Reg. 30426 (May 28, 2008).

- (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 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). The injury must 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).

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*, 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. Similarly, 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). Failure to do so requires that the contention be rejected. *Palo Verde*, CLI-91-12, 34 NRC at 155.

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). "A petitioner's issue will be

ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” *Id.* 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. Any supporting material provided by a petitioner, including those portions of the material that are not relied upon, is subject to Board scrutiny. *Yankee Nuclear*, LBP-96-2, 43 NRC at 90. Likewise, providing any material or document as the foundation for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention. *Fansteel*, CLI-03-13, 58 NRC at 204.

In short, the information, facts, and expert opinions provided by the petitioner must be examined by the Board to confirm that the petitioner does indeed supply support for the contention adequate to establish a genuine dispute on a material issue.

C. Nexus Between Standing and Contentions in NRC Proceedings

The Commission in CLI-96-1 discussed the nexus between standing and contentions, stating that “once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing.” *See Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996). The Commission went on to specifically state that an intervenor’s contentions may be limited to those that will afford it relief from the injuries asserted as a basis for standing. *Id.*, at n.3.

The Supreme Court recently reaffirmed the principle that standing must be shown for every single claim in *Davis v. Federal Election Commission*.<sup>4</sup> The *Davis* Court reiterated that “standing is not dispensed in gross,” and remarked that a party “must demonstrate standing for each claim he seeks to press” and “for each form of relief that is sought.” \_\_\_ U.S. \_\_\_, slip op. at 7 (June 26, 2008) citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000); see also, *Rosen v. Tenn. Commissioner of Finance and Admin.*, 288 F.3d 918 (6th Cir. 2002) (“It is black-letter law that standing is a claim-by-claim issue.”). According to the Court, standing for one claim does not suffice for all claims even where those claims arise from the same nucleus of operative fact. *DaimlerChrysler*, 547 U.S. at 352. Because Article III standing is rooted in the need for an actual “case or controversy,” holding otherwise, the Court noted, would undermine other important judicial principles and permit, for example, adjudication of moot or unripe claims. *Id.*

In articulating its reasoning for requiring standing for each claim, the Court explained that the actual-injury requirement would hardly serve its intended purpose of ensuring that there is a legitimate role for an agency adjudicatory body in dealing with a particular grievance if, once a party demonstrated harm from one particular inadequacy in government administration, the adjudicatory body were authorized to remedy all inadequacies in that

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<sup>4</sup> The Commission has repeatedly and unambiguously stated that contemporaneous judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189a of the Atomic Energy Act. See, e.g., *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Atlas Corporation* (Moab, Utah), LBP-00-4, 51 NRC 53, 55 (2000); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002).

administration. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). As the Court emphasized in *Lewis*, “[t]he remedy must of course be limited to the inadequacy that produced the injury in fact that the [party] has established.” *Id.* This statement echoes the description of the nexus between standing and contentions articulated by the Commission in *Yankee*: contentions must be limited to those that will afford relief from the injuries asserted as a basis for standing.

### III. DISCUSSION

For the reasons set forth below, the petitioner has not demonstrated standing or proffered an admissible contention.

#### A. Petitioner Has Not Demonstrated Standing

Based on the affidavit and the discussion in the petition, it is clear that petitioner’s primary interest is in enforcement of treaty rights, and not the activities of Crow Butte. In order to establish standing, an organization must allege: (1) that the action will cause an “injury in fact” to either (a) the organization’s interests or (b) the interests of its members; and (2) that the injury is within the “zone of interests” protected by either the AEA or NEPA. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 n.10 (1994). An organization must demonstrate a discrete institutional injury to the organization itself. *White Mesa*, CLI-01-21, 54 NRC at 252. General environmental and policy interests are insufficient to confer organizational standing. *Id.*

Here, the petition fails to demonstrate organizational standing. The petitioner vaguely states that Crow Butte’s use of water for its operations affects the ability of the tribe and its members to use its water sources. However, the petition fails to specify how the licensed activities might injure them. The petition does not state the location or frequency of tribal members’ use of these water resources. Petitioner has therefore failed to demonstrate that the alleged injury is “concrete and particularized,” rather than “conjectural” or “hypothetical.”

The petition also fails to specify the aquifer from which tribal members draw well water, much less demonstrate that this aquifer could potentially be contaminated by activities at the Crow Butte operation 30 miles away. This is not a trivial distance when the flow rate in the Basal Chadron is roughly 10 feet/year. At this rate, contamination of tribal members' wells 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. Judicial and Commission standing jurisprudence requires "realistic threat ... of direct injury," yet no such showing has been made by petitioners. *White Mesa*, CLI-01-21, 54 NRC at 254.

To establish injury-in-fact, an organization must show a causal relationship between the alleged injury and the proposed licensing activity. *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990). Here, a realistic assessment of local hydrology all but eliminates any possibility of an impact from Crow Butte's operations on groundwater at the Pine Ridge Reservation. In the absence of a mechanism or pathway for contamination of areas used by petitioner, injury and causation are "unfounded conjecture." *White Mesa*, CLI-01-21, 54 NRC at 253.

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.<sup>5</sup> Here, any injury based on possible groundwater contamination is similarly speculative. Based on the physical properties of the area, there is no obvious potential for offsite consequences.

With regard to surface water, any potential offsite consequences are likewise speculative and unfounded. The application explains that the license area is within the watershed of Squaw Creek and English Creek, which are small tributaries of the White River. Application, at 2-131. However, Crow Butte has taken affirmative steps to protect surface water quality in the event of a wellfield accident. In Section 7.4.2.2, Crow Butte notes that wellfield areas are installed with dikes or berms to prevent spilled solution from entering surface water features. Application, at 7-9. Process buildings are constructed with secondary containment, and a regular program of inspections and preventive maintenance is in place. *Id.* Moreover, *pre-operational* testing of sediment samples in Squaw and English Creeks indicated elevated uranium concentrations. Application, at 5-87. And, Squaw Creek samples showed elevated uranium concentrations upstream from the current operations. *Id.* This clearly undercuts petitioners' arguments that Crow Butte creates any obvious potential for offsite contamination of surface water resources. Conclusory allegations about potential radiological harm from a facility in general are insufficient to establish standing.

Further, the petition does not indicate how the White River could be impacted by Crow Butte's operations or specify any particular source of contamination. Nor does the petition indicate how Crow Butte's operations have reduced the total amount of water available or caused

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<sup>5</sup> 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.*

health impacts to tribal members. Ultimately, there is nothing in its affidavit to support a finding that Crow Butte's continued operations will "cause" contamination or harm to petitioner.

Petitioner's primary interest appears to be in enforcing various treaties between the Oglala Sioux and the United States. Such an interest is clearly insufficient to support standing. Standing must be founded upon more than just strong organizational interest in compliance with the dictates of federal and state laws and regulations. *White Mesa*, LBP-01-15, 53 NRC 344, 348 (2001); *Ten Applications for Low-Enriched Uranium Exports to EURATOM Member Nations*, CLI-77-24, 6 NRC 525, 531 (1977), citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

The petition discusses the history of Fort Laramie treaties and states that the United States has failed to live up to its responsibilities under those treaties. In this regard, the petition fails to raise an issue within the zone of interests of the AEA or NEPA. In the context of this licensing action, the AEA is concerned exclusively with the radiological impacts of a proposed project.<sup>6</sup> Treaty issues are beyond the AEA. Similarly, the NRC Staff's environmental review under NEPA is focused on the environmental impacts of a project. To the extent that NEPA does extend to impacts on cultural and historic resources, no specific harm is alleged here. The mere reference to the Fort Laramie treaties adds nothing to establish standing on this basis.

Moreover, there is simply no role for the NRC under the AEA or NEPA in adjudicating or assessing inter-governmental agreements and treaties made by the U.S. Government with other tribes, nations, or sovereigns. See *Hydro Resources Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC \_\_\_, slip op. at 4 (2006) ("While the NRC

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<sup>6</sup> Some sections of the AEA address international trade and commerce in nuclear material and components. See, e.g., 42 U.S.C. § 2112 (export licensing). These sections, however, are unrelated to the licensing of a uranium recovery facility.

recognizes the tribal sovereignty of the Navajo Nation, it is not the function of the EIS process to resolve existing or potential jurisdictional disputes [over water rights].”). The NRC is not equipped, or authorized, to assess the Federal Government’s compliance with its obligations under the Fort Laramie Treaties. Nor is there any indication that Crow Butte, as a private applicant, has any role or obligation under the treaties. To the extent that the petitioner has even alleged an injury, injuries to petitioner arising from the actions of parties other than the applicant (in this case, the Federal Government and/or States) are not a result of the disputed application. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 124 (2000).

For these reasons, the petitioner has failed to demonstrate standing in this proceeding.

**B. The Proposed Contentions Are Not Admissible**

Each of the proposed contentions will be discussed below. However, two recurring defects occur throughout. First, it is the responsibility of the petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions, including a explanation of the bases for its contentions. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990). The provisions of 10 C.F.R. § 2.309(f)(1)(ii), (v), and (vi) were specifically added by the Commission “to raise the threshold bar for an admissible contention,” and prohibit “notice pleading, with the details to be filled in later” and “vague, un[-]particularized contentions.” *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334, 338 (1999). Petitioner consistently fails to meet this strict standard. This defect is fatal to the proposed contentions.

Second, the petitioner frequently raises historical or operational matters that they have not demonstrated are relevant during the license renewal period. These are therefore

outside the scope of this proceeding. For environmental issues, the focus of license renewal is on updating or supplementing the information previously submitted to reflect any significant environmental change, including any significant environmental change resulting from operational experience or a change in operations or proposed decommissioning activities. 10 C.F.R. § 51.60(a). To be within the scope of the license renewal proceeding, a proposed contention must therefore allege that there is a new or different significant environmental impact not previously disclosed or considered.

The safety issues relevant to license renewal are significantly different from, and defined more narrowly than, those relevant during an original licensing proceeding. Based on that initial licensing determination, certain safety issues that were reviewed for the initial license have been closely monitored by the NRC and need not be reviewed again in the context of a license renewal application. Petitioners have not shown that there are any unresolved safety issues that would continue into the renewal period. Ongoing NRC oversight programs (reporting obligations, inspection, enforcement) are the mechanisms through which compliance with the current licensing basis is monitored and ensured.<sup>7</sup> Thus, the current licensing basis for Crow Butte need not be reviewed again and is not subject to attack in a license renewal proceeding.

1. *Environmental Contention A – There is no evidence based science for the CBR 's conclusion that ISL mining has "no non radiological health impacts" (See Table 8.6-1 of application), or that non-radiological impacts for possible excursions or spills are "small" (see 7.12.1 of application).*

As the basis for Environmental Contention A, petitioner argues that Crow Butte has provided “no scientific evidence” to show that residents around the site and up to Pine Ridge

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<sup>7</sup> An analogy can be drawn here to 10 C.F.R. Part 54 license renewal for power reactors. In promulgating those regulations, the NRC announced that the “first principle” of license renewal is that the ongoing regulatory process is adequate to ensure that currently operating plants provide and maintain an acceptable level of safety. 60 Fed. Reg. 22461, 22464 (May 8, 1995).

have no significant risk to their health. Ultimately, however, it is the responsibility of the petitioner to provide the necessary information to satisfy the basis requirement for the admission of its contentions, including an explanation of the bases for its contentions. *Seabrook*, ALAB-942, 32 NRC at 416-417. Here, obtuse references to documents not included with the petition fail to provide an adequate basis for the contention.

Petitioners cite to a letter from John Peterson in 1989 (not attached to petition) and an opinion of Dr. LaGarry regarding potential for contamination of the aquifers at Pine Ridge from Crow Butte's operations. *Pet.*, at 7. Neither of these references show a genuine dispute with the application. Rather than articulate a basis for the contention or describe some dispute with the application on a material issue, petitioners simply refer to the Peterson letter and LaGarry opinion without any explanation as to how it raises a dispute with the findings in the application. Parties cannot be expected to sift unaided through documents in order to piece together and discern the intervenors' particular concerns or the grounds for its claims. *See Hydro Resources*, CLI-01-4, 53 NRC at 46. Attaching a document in support of a contention without any explanation of its significance simply cannot provide an adequate basis for a contention. *Fansteel*, CLI-03-13, 58 at 205.

In any event, the LaGarry opinion does not take issue with any specific portion of Crow Butte's application.<sup>8</sup> Indeed, the LaGarry opinion is nothing more than an overview of the regional geology. This is not the specific statement required by Section 2.309(f)(1) and fails to

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<sup>8</sup> We note also that Dr. LaGarry's research has an academic, rather than an engineering, focus. His opinion does not indicate that he is a licensed professional engineer or a licensed professional geologist. Registered Professional Engineers/Geologists have the authority to sign and seal or "stamp" engineering/geology documents (reports, drawings, and calculations) for a study, design, or analysis, thereby taking legal responsibility for it. In the absence of a professional license, it is not clear that Dr. LaGarry is qualified to offer an opinion in this proceeding.

establish a dispute with the detailed, site-specific investigations performed by Crow Butte as referenced in the application.<sup>9</sup> Moreover, to the extent that LaGarry identifies a “wish list” of activities and investigations that Crow Butte ought to undertake, petitioners cite no regulatory provision in support of their position. LaGarry’s opinion as to what applicable regulations should (but do not) require cannot serve as a basis for a contention. *See G.I.T.*, LBP-95-6, 41 NRC at 303.

Further, the petition argues that Crow Butte’s spill contingency plan is somehow inadequate. Petitioners argue that biweekly sampling of monitoring wells may not capture wellfield “excursions.” However, petitioners provide no expert or factual support to call into question the adequacy of Crow Butte’s monitoring program. As the application notes, an undetected excursion is highly unlikely. Application, at 5-29. All wellfields are surrounded by a ring of monitor wells located no further than 300 feet from the wellfield and screened in the ore-bearing Chadron aquifer. *Id.* Additionally, monitor wells are placed in the first overlying aquifer above each wellfield segment. *Id.* Sampling of these wells is done on a biweekly basis. Past experience at in-situ leach mining facilities has shown that this monitoring system is effective in detecting leachate migration. *Id.* The total effect of the close proximity of the monitor wells, the low flow rate from the well patterns, and overproduction of leach fluids (production bleed) makes the likelihood of an undetected excursion extremely remote. *Id.* Petitioner fails to establish a genuine dispute with respect to the application.

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<sup>9</sup> Pump tests conducted by Crow Butte indicate no faulting or fracturing that affect the confinement of the Chadron Sandstone or which would affect in-situ mining of the uranium mineralization. Application, at 2-114.

Petitioner also argues that there is no scientific basis for excluding uranium from the monitor well testing. Pet., at 7. To the contrary, Crow Butte explains its choice of excursion parameters as follows:

The parameters and constituents chosen for indicators of lixiviant migration and for which [upper control limits] are set are chloride, conductivity, and total alkalinity. Chloride was chosen due to its low natural levels in the native groundwater and because chloride is introduced into the lixiviant from the ion exchange process (uranium is exchanged for chloride on the ion exchange resin). Chloride is also a highly mobile constituent in the groundwater and will show up very quickly in the case of a lixiviant migration to a monitor well. Conductivity was chosen because it is an excellent general indicator of overall groundwater quality. Total alkalinity concentrations should be affected during an excursion, as bicarbonate is the major constituent added to the lixiviant during mining.

Application, at 5-107. Petitioners have not shown how Crow Butte's choice of parameters is inadequate to detect any excursions. The Abitz opinion referenced in the petition (which was not attached to this petition) does not establish a genuine dispute with the applicant on a material issue. Although Abitz argues that uranium should also be used as an excursion indicator, he does not argue that use of the parameters selected by Crow Butte are somehow inadequate to detect excursions.<sup>10</sup> Nor do petitioners point to any regulatory or statutory basis for requiring testing by an independent outside lab or show that Crow Butte's lab testing is somehow inadequate. Pet., at 8. Petitioners must link an alleged deficiency with a regulatory violation or a substantial health and safety concern. Abitz's or the Oglala Sioux Tribe's opinion as to what applicable

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<sup>10</sup> Dr. Abitz does not include any statement of experience or qualification with his opinion. He does not indicate that he is a licensed professional engineer or a licensed professional geologist. Registered Professional Engineers/Geologists have the authority to sign and seal or "stamp" engineering/geology documents (reports, drawings, and calculations) for a study, design, or analysis, thereby taking legal responsibility for it. In the absence of a professional license, it is not clear that Dr. Abitz is qualified to offer an opinion in this proceeding.

regulations should (but do not) require cannot serve as a basis for a contention. *See G.I.T.*, LBP-95-6, 41 NRC at 303.

Further, the monitoring requirements (parameters, monitoring well spacing, location of shallow monitoring wells) are established by the Class III permit issued by the State of Nebraska. *See* Permit No. NE0122611, at Parts II.B and III.B. This permit authorizes the underground injection and mineral production wells at Crow Butte.<sup>11</sup> The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. *Northern States Power Company*, ALAB-464, 7 NRC at 375. To the extent that petitioners are challenging the adequacy of the state-issued permit, the matter is outside the scope of the proceeding, which is limited to compliance with the AEA and NRC regulations.

The petition also argues that Crow Butte has failed to produce scientific data to substantiate the finding of “no non radiological health effect” and contrast that finding with the discussion of ecological impacts in the application. *Pet.*, at 8. Petitioners apparently are confusing “non-radiological impacts” with “non-radiological health impacts.” *Compare* Table 8.6.1, at page 8-10 (Nonradiological health impacts) *and* Section 7.12.1, starting at page 7-34 (Nonradiological impacts). Regardless, the petition does not identify any impact from Crow Butte’s operations — non radiological or health-related — that was not addressed in the application. An alleged omission, without more, does not provide a basis for believing that there

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<sup>11</sup> The regulations in Title 122 of the Nebraska Administrative Code ensure proper well construction and regulate the injection of fluids into the subsurface. The Nebraska Department of Environmental Quality (“NDEQ”) approves injection wells, which must be operated and managed in accordance with applicable Nebraska regulations. NDEQ issues and approves Underground Injection Control (“UIC”) permits, conducts inspections, and performs compliance reviews for injection wells to ensure that injection activities comply with State and Federal regulations and to ensure that groundwater is protected from potential contamination sources. NDEQ has authority over Class I, III, and V wells in Nebraska.

is a safety issue. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983).

Petitioners also argue that Crow Butte has failed to perform a literature review regarding the non-radiological impacts of ISL mining on the public at large and the Oglala Sioux tribe in particular. Petitioners point to no regulatory or statutory requirement to conduct a literature review of the impacts of ISL mining. Nor do petitioners point to any alleged deficiency in the application regarding non-radiological health effects. A petitioner must allege deficiencies or errors 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. *Diablo Canyon*, LBP-02-23, 56 NRC at 439-41. Petitioner's opinion as to what applicable regulations should (but do not) require cannot serve as a basis for a contention. *See G.I.T.*, LBP-95-6, 41 NRC at 303.

Finally, the petition contains a lengthy discussion of scientific literature and testimony regarding exposure to uranium. The petition does not point to any alleged deficiency in any particular portion of the application or otherwise raise a dispute with the application. Nor is this information material to the findings that the NRC must make with respect to the renewal application at issue. To be admissible, a contention must demonstrate some link between the activities proposed and an impact on public health or safety. Here, the discussion of health issues generally and historical events unrelated to Crow Butte's operations cannot support an admissible contention.

For all of these reasons, Environmental Contention A is inadmissible.

2. *Environmental Contention B – The Oglala Sioux Tribe has not been consulted with regarding the cultural resources that may be in the license renewal area. The Applicant has identified what it believes to be cultural resources in the area, but the Tribe has had no input on this list, and it therefore cannot be complete. Furthermore, the Applicant has provided that it will work in conjunction with the Nebraska State Historical Society to avoid the identified resources, but this ignores mandated participation of the Oglala Sioux Tribe.*

Environmental Contention B is inadmissible for failing to demonstrate a genuine dispute with the application on a material issue. First, the petition fails to take issue with any specific portion of the application. Although petitioners argue that they must be consulted regarding the significance of the cultural resources identified during intensive field studies performed previously, petitioners do not assert that the significance of any identified resources was underestimated or ignored. Nor have petitioners argued that Crow Butte’s operations during the renewal period will adversely impact particular, identified resources. Indeed, the application notes that potentially significant resources “have been avoided,” and that further construction activities “will avoid” these resources. Application, at 7-27. Thus, the petitioner has failed to demonstrate a genuine dispute with the application.

Second, the petition does not identify any requirement that mandates Crow Butte’s (as opposed to the NRC’s) obligation to consult with the Tribal Historic Preservation Officer. There is no legal requirement that the *applicant* consult with state or tribal authorities under the National Historic Preservation Act (“NHPA”), 16 U.S.C § 470. The requirement to consult applies only to federal agencies such as the NRC. Any challenge based on failure to consult under the NHPA is therefore premature. Petitioner’s opinion as to what applicable regulations should (but do not) require cannot serve as a basis for a contention. *See G.I.T.*, LBP-95-6, 41 NRC at 303.

There is an additional, compelling reason for rejecting this proposed contention: 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; *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (“[S]tanding is not dispensed in gross.”). Because petitioner failed to demonstrate an actual injury-in-fact relating to cultural resources, there is no standing to support proposed Environmental Contention B.

3. *Environmental Contention C – In 7.4.2.2 in its application for renewal, CBR characterization that the impact of surface waters from an accident is “..minimal since there are no nearby surface water features.” does not accurately address the potential for environmental harm to the White River.*

Here, the petitioner asserts that Crow Butte “ignores” the potential for an accident to impact the White River. Pet., at 16. However, as explained in the Application, Crow Butte has taken affirmative steps to protect surface water quality in the event of a wellfield accident. In Section 7.4.2.2, Crow Butte explicitly acknowledges the potential to impact surface water quality, but then discusses the measures in place to protect water quality. For example, wellfield areas are installed with dikes or berms to prevent spilled solution from entering surface water features. Application, at 7-9. Process buildings are constructed with secondary containment, and a regular program of inspections and preventive maintenance is in place. *Id.* Crow Butte also discussed measures to protect against contamination of the shallow aquifer (Brule), which is referred to as the “White River alluvium” in the petition. *See* Application, at 7-13 to 7-14. These measures include use of high density polyethylene with butt welded joints and leak testing. *Id.*, at 7-14. If a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine issue. *Turkey Point*, LBP-90-16, 31 NRC at 521, n.12.

Further, petitioners must show deficiencies or errors 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 Electric 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). Here, petitioners do not challenge the adequacy of the specific steps that Crow Butte has taken to minimize potential surface water impacts, nor do they show that any impacts were overlooked. Accordingly, petitioners have failed to establish a genuine dispute with the application on a material issue and the contention must be rejected.

4. *Environmental Contention D – In 7.4.3 CBR's Application incorrectly states there is no communication among the aquifers, when in fact, the Basal Chadron aquifer, where mining occurs, and the aquifer, which provides drinking water to the Pine Ridge Indian Reservation, communicate with each other, resulting in the possibility of contamination of the potable water.*

Proposed Environmental Contention D is inadmissible. Although the petitioners assert that “[t]he aquifers do communicate,” they provide no evidence to support this claim. The excerpt from a report by LaGarry proffered in the petition does not indicate communications among aquifers.<sup>12</sup> Instead, it posits a potential link to the White River, but not to the aquifers used for drinking water in Pine Ridge. In any event, the LaGarry opinion does not take issue with any specific portion of Crow Butte’s application. Indeed, the LaGarry opinion is nothing more than an overview of the regional geology. This is no substitute for the detailed, site-specific investigations performed by Crow Butte described in the application.<sup>13</sup> The petitioner has therefore failed to demonstrate a genuine dispute with the application.

Petitioners also cite to a November 8, 2007 letter from the Nebraska Department of Environmental Quality, but this document is not attached to the petition either. That letter, in

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<sup>12</sup> This excerpt is apparently not from the LaGarry opinion attached to the petition to intervene.

<sup>13</sup> Pump tests conducted by Crow Butte indicate no faulting or fracturing that affect the confinement of the Chadron Sandstone or which would affect in-situ mining of the uranium mineralization. Application, at 2-114.

any event, reflects comments from a *preliminary* review of Crow Butte’s Aquifer Exemption Petition for the North Trend Expansion by the State of Nebraska. Thus, the proposed contention raises issues not within the ambit of this licensing proceeding, which is focused on compliance with the AEA and NRC regulations, not Nebraska permitting requirements.<sup>14</sup> Merely pointing to questions of another agency — in an entirely different regulatory context — is a far cry from the specificity the Commission’s contention rule demands.

Further, in the context of Nebraska’s review, this document is analogous to an NRC Staff Request for Additional Information (“RAI”). 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 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 license application. Merely pointing to RAIs of another agency — in an entirely different

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<sup>14</sup> To the extent that petitioners are implicitly challenging the aquifer exemption issued by the State of Nebraska, the proposed contention is raising an issue outside the scope of this proceeding. In order to inject lixiviant into the mining zone, the aquifer must be exempted from Clean Water Act protections by the NDEQ and the USEPA. Thus, Crow Butte was required to obtain an aquifer exemption under the provisions of the State and Federal UIC regulations. *See, e.g.*, Application, at 10-1 (Table 10.1-1 lists aquifer exemption issued by Nebraska DEQ in 1984). The criteria for an exemption of an aquifer are found at 40 C.F.R. § 146.4, and include the requirement that the aquifer not currently be used as a source of drinking water, and that the water quality be such that it would be technically or economically impractical to use the water to supply a public water system.

regulatory context — is a far cry from the basis and specificity that the Commission’s contention rule demands.

At bottom, the proposed contention fails to demonstrate a genuine dispute with the applicant on a material issue. Simply alleging some potential issue does not, without more, provide a basis for believing that there is a safety issue. *Texas Utilities Generating Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1263 n.6 (1983). 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). Thus, proposed Environmental Contention D is inadmissible.

5. *Environmental Contention E – CBR's application incorrectly states in 7.11 that "Wastes generated by the facility are contained and eventually removed to disposal elsewhere."*

The petitioner’s sole support for this contention is a complaint and consent decree filed against Crow Butte for violations of Crow Butte’s Underground Injection Control (“UIC”) permit issued by the Nebraska DEQ in 1990.<sup>15</sup> This issue is outside the scope of this NRC proceeding, which is necessarily limited to Crow Butte’s compliance with the Federal AEA and NRC regulations. The requirements of State law are for State bodies to determine, and are beyond the jurisdiction of NRC adjudicatory bodies. *Northern States Power Company* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

Although the petitioner argues that this violation of a state-issued permit shows that Crow Butte’s procedures “demonstrably do *not* protect health,” the consent decree notes that Crow Butte was recycling its well development water as a conservation measure and acknowledges that such treatment “did not result in any pollution of either the surface of the

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<sup>15</sup> Neither the complaint nor consent decree were attached to this petition to intervene.

ground or any aquifer thereunder.” Consent Decree, at ¶2. Moreover, Crow Butte self-discovered the violation and self-reported it to NDEQ. To form the basis for an admissible contention, allegations of improprieties must be of more than historical interest: they must relate directly to the proposed licensing action. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 365 (2001). There is no assertion that this issue will recur, and it therefore cannot serve as a basis for a contention.

Petitioners assert that a violation of 10 C.F.R. § 40.9, entitled “Completeness and accuracy of information,” represents an independent basis for the admission of their contentions, *i.e.*, a mere allegation that some substantive information is, in their view, incomplete or inaccurate, represents an independent reason to deny the application.<sup>16</sup> However, no such independent basis exists. Section 40.9 presents no substantive standards or criteria for determining whether the applicable provisions of 10 C.F.R. Part 40 have been met.<sup>17</sup> *Cf.*, 10 C.F.R. §§ 40.31, 40.32 and 10 C.F.R. Part 40, Appendix A. Section 40.9 is simply not material to a finding the NRC must make to support the action that is involved in the proceeding. *See* 10 C.F.R. § 2.309(f)(1)(iv).

To the contrary, 10 C.F.R. § 40.9 is tied to an enforcement mechanism whose use is within the sole discretion of the Commission through its Staff and has not been delegated to the Board.<sup>18</sup> As stated in the Commission’s General Statement of Policy and Procedures for

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<sup>16</sup> Petitioners actually cite to “10 CFR 49.1 A and B.”

<sup>17</sup> 10 C.F.R. § 40.9 merely references “information required by statute or by the Commission’s regulations, orders, or license conditions . . . .”

<sup>18</sup> *Advanced Medical Systems, Inc.*, CLI-94-6, 39 NRC 285, 312-313 (1994), *aff’d Advanced Medical Systems, Inc. v. NRC*, 61 F.3d 903 (6<sup>th</sup> Cir. 1995). The appropriate mechanism to pursue this matter would be a petition under 10 C.F.R. § 2.206. *See, e.g.*, DD-03-02, License No. SNM-770. *Westinghouse Electric Company LLC*, Waltz Mill Service Center, Madison, PA; Notice of Issuance of Director’s Decision Under 10 CFR

NRC Enforcement Action: “A violation of the regulations involving the submittal of incomplete and/or inaccurate information . . . can result in the full range of enforcement sanctions.” NRC Enforcement Policy, at 43.<sup>19</sup>

In essence, the reliance by Petitioners on Section 40.9 is an attempt to litigate the completeness of the application and its docketing by the Staff. This is beyond the scope of the matter before this panel. As another Licensing Board explained, “[t]he completeness of [an application] is not a matter that this Board should or can decide . . . [as the] decision whether to accept the [application] for docketing is made by the NRC Staff . . . .”<sup>20</sup> Additionally, the “NRC does not ‘violate[] any clear legal duty by proceeding first to docket [an application] and thereafter to request additional information.’”<sup>21</sup> Mere citation of § 40.9 by the Petitioners should not allow them to shortcut pleading requirements that they independently review the application, as filed, and identify with particularity any deficiencies they assert are present.

Having failed to show a violation of a state-issued permit raises a genuine issue on a NRC license application, proposed Environmental Contention E must be rejected.

C. Discretionary Intervention Is Not Warranted

The petitioner also seeks discretionary intervention in the event that the Board finds no standing. Pet., at 8. This request should be denied. Under 10 C.F.R. § 2.309(e), a

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2.206, 68 Fed. Reg. 52432 (September 3, 2003) (requesting to abate a violation of 10 CFR 50.5).

<sup>19</sup> The most recent version of the Enforcement Policy can be found on the NRC’s website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/enforce-pol.html> (last visited 8/16/08).

<sup>20</sup> *Id.* at 336 (quoting *Concerned Citizens of Rhode Island v. NRC*, 430 F. Supp. 627, 634 (D. R.I. 1977)).

<sup>21</sup> *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 95-96, *aff’d* CLI-04-36, 60 NRC 631 (2004).

request for discretionary intervention can only be considered when “at least one requestor/petitioner has established standing and at least one admissible contention has been admitted so that a hearing will be held.” *See also* “Final Rule: Changes to Adjudicatory Process,” 69 Fed. Reg. 2,182, 2,189 (January 14, 2004) (“Discretionary intervention, however, will not be allowed unless at least one other petitioner has established standing and at least one admissible contention.”).

To gain discretionary standing a petitioner must address other Commission requirements. Under 10 C.F.R. § 2.309(e), a petitioner must, in addition to addressing the standing requirements under Section 2.309(d)(1), address in the initial petition: (1) factors weighing in favor of allowing intervention, and (2) factors weighing against allowing intervention. Here, petitioner has not addressed the required factors. Thus, even if the Board determines later that there is standing/admissible contention, the petitioner’s request should be denied for failure to comply with Section 2.309(e).

#### IV. CONCLUSION

For all of the above reasons, the Oglala Sioux Tribe lacks standing and has not submitted an admissible contention. Nor has the petitioner demonstrated that discretionary intervention is warranted. Accordingly the petition to intervene and request for hearing should be denied.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_  
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Dated at San Francisco, California  
this 22<sup>nd</sup> day of August 2008

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	)	
	)	Docket No. 40-8943
CROW BUTTE RESOURCES, INC.	)	
	)	ASLBP No. 08-867-02-OLA-BD01
(License Renewal)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PETITION TO INTERVENE FILED BY OGLALA SIOUX TRIBE” in the captioned proceeding have been served on the following persons via the Electronic Information Exchange this 22nd day of August 2008.

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