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)	)	

APPLICANT'S RESPONSE TO PETITION TO INTERVENE FILED BY OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL

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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 Delegation of the Great Sioux Nation Treaty Council ("Oglala Delegation" or "Petitioner").[1]

For the reasons discussed below, the petition should be denied for failing to comply with standing requirements set forth in 10 C.F.R. § 2.309(d) and for failing to meet 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

[1] "Request for Hearing and Petition for Leave to Intervene," dated July 28, 2008.

Butte requested that the NRC renew its source material license. Ltr. from Stephen P. Collings to 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.[2]

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.[3] 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:

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[2] 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.

[3] *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).

(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. Y*ankee 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.

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. Indeed, the petition describes the Oglala Delegation as the traditional entity established to negotiate and enforce treaties. However, the petitioner does not allege any specific harm to the organization's interests from the operation of Crow Butte. An organization must demonstrate a discrete institutional injury to the organization itself. *White Mesa*, CLI-01-21, 54 NRC at 252. In his affidavit, Chief Oliver Red Cloud discusses the history of Fort Laramie treaties and states that the United States has failed to live up to its responsibilities under those treaties. 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). Therefore, petitioner has failed to establish that any alleged harm would be redressed by a favorable decision.

Nor has petitioner established any other injury from Crow Butte's operations. While the petitioner raises "contentions" regarding water, there is no discussion of a mechanism for groundwater or surface water contamination that would affect them or reference any particular source of contamination. In fact, the Pine Ridge Reservation is at least 30 miles away from Crow Butte. 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). 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.

Nor does petitioner aver that Crow Butte's activities will harm any specific artifacts in the area near Crow Butte's operations. A recitation of historical events and a generalized interest in land and water resources is not a cognizable injury for standing purposes. The organization must demonstrate some injury that is "concrete and particularized," not "conjectural" or "hypothetical." General environmental and policy interests are insufficient to confer organizational standing. *PFS*, 52 NRC at 124.

Similarly, to the extent that petitioner asserts an interest in enforcing various treaties between the Oglala Sioux and the United States, such an interest is insufficient to support standing. First, 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).

Second, the affidavit also 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.[4] Treaty issues are beyond the AEA. Similarly, the NRC Staff's environmental review under NEPA is focused on the environmental impacts of a particular 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 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.

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[4] 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.

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

B. The Proposed "Contentions" Are Not Admissible

Each of the "contentions" averred by the petitioners will be discussed below. However, three recurring defects occur throughout. First, the contentions on their face fail to address the contention pleading criteria set forth in 10 C.F.R. § 2.309(f)(1). These criteria are mandatory and must be scrupulously followed. As the Commission has stated with respect to these regulatory provisions, "[i]f any one of these requirements is not met, a contention must be rejected." *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).[5] Ultimately, it is the responsibility of the petitioner, not the Licensing Board, 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. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990). The petitioners have not even attempted to address these criteria in their petition. There are no labels or any numbering scheme for their proposed "contentions" and no information to address each of the requirements for an admissible contention as articulated in the *Federal Register* notice for this proceeding.

Second, the petitioner has wholly failed to provide any discussion of the bases for the contentions or pointed to any specific deficiencies in the application. There are no expert affidavits or documents cited in support of the contentions. 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

[5] According to the Commission, the *Palo Verde* Licensing Board erred by inferring a basis for the petitioners' contention when the petitioners failed to comply with the requirements of 10 C.F.R. § 2.309(f) to clearly state the basis for its contention and to provide sufficient information to support its contention. *Palo Verde*, 34 NRC at 155-56.

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). These defects are fatal to the proposed contentions.

Third, the petitioner 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.[6]

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[6] 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

Against this backdrop and for the reasons discussed below, none of petitioner's proposed contentions are admissible. They are both procedurally and substantively deficient. At most, they have provided vague statements of "contentions," and, for the sake of argument, we will assume that those are intended to be their proposed contentions.

1. *First Environmental Contention (page 3) – "[A]rtifacts and evidence of ancient aboriginal occupancy in the Crow Butte Mine area is not being adequately investigated or addressed."*

For the first environmental "contention," there is no attempt here to provide the specific information required by 10 C.F.R. § 2.309(f)(1), and therefore the proposed "contention" is flawed on its face. The petitioner has not provided a specific statement of law or fact or an explanation of the proposed contention, nor has it demonstrated that the contention is within the scope of the proceeding or that it raises issues that are material to the findings that the NRC must make. There is no statement of alleged facts or expert opinion or any information to show a dispute with the application on a material fact. Petitioner does not even cite any portion of the application that they allege to be deficient. And, in light of the ongoing operations at the site, there is nothing to suggest that there will be any new or different impacts to cultural resources during the renewal period.

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 413, at 439-41. Notice pleading is not allowed. *Oconee*, CLI-99-11, 49 NRC at 334, 338. Yet, here, the petitioner has provided no information regarding the bases for the proposed contention and does not address

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operating plants provide and maintain an acceptable level of safety. 60 Fed. Reg. 22461, 22464 (May 8, 1995).

any of the NRC's procedural or substantive requirements for an admissible contention. As a result, the contention must be rejected for failing to satisfy 10 C.F.R § 2.309(f)(1)(i)-(vii).

Furthermore, an intervenor's contentions must be limited to those that will afford it relief from the injuries asserted as a basis for standing. *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, n.3 (1996). The Supreme Court recently 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." *Davis v. Federal Election Commission* __ U.S. __, slip op. at 7 (June 26, 2008); *see also Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to the inadequacy that produced the injury in fact that the [party] has established.").

Here, the petitioner has not asserted an injury-in-fact associated with a failure to investigate or address evidence of ancient aboriginal occupancy of the area. The petitioner does not argue that Crow Butte has overlooked any evidence or specify how the project might harm such artifacts even if present or suggest that mitigation measures (*e.g.*, avoidance) would be inadequate. 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. *Hydro Resources*, CLI-06-29, 64 NRC __, slip op. at 4. The NRC is not equipped, or authorized, to assess the Federal Government's compliance with its treaty obligations. Nor is there any indication that Crow Butte, as a private applicant, has any role or obligation under the treaties.

Thus, the first environmental "contention" must be rejected for the additional reason that, even if proved, it will not afford the petitioner relief.

2. Second Environmental Contention (page 4) – "[M]any families, including those of the petitioning Oglala Delegation of the Great Sioux Nation Treaty Council obtain their drinking water, irrigation water, and spiritual water from wells or surface streams that have been contaminated by operations of Crow Butte Mine."

The second environmental "contention" is inadmissible for failing to provide the specific information required by 10 C.F.R. § 2.309(f)(1)(i)-(vii). The proposed "contention" is therefore flawed — both procedurally and substantively — on its face. The petitioner does not explain how contamination of aquifers or surface water could occur or argue that Crow Butte's application is inadequate to protect public health and safety. There is no indication of what water bodies are alleged to be contaminated or any data to demonstrate such contamination. Nor is there any suggestion that groundwater at Crow Butte could be used as a drinking water source.[7] In short, there is no basis for the contention. 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. "Notice" pleading is not permitted in NRC adjudications. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Rather, the Commission insists on detailed descriptions of the petitioner's position on proposed contentions. *Shieldalloy Metallurgical Corp.* (Cambridge Ohio Facility), CLI-99-12, 49 NRC 347, 353 (1999).

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[7] 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. 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.

For the above reasons, petitioner has failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The second environmental "contention" is therefore inadmissible and must be rejected.

3. Third Environmental Contention (page 4) – "[T]he health of the Oglala Lakota, including not only members of the Oglala Delegation of the Great Sioux Nation Treaty Council, but those persons and families they are ordained to protect, is adversely affected by the operation of the Crow Butte Mine."

The third environmental "contention" is inadmissible for failing to address the factors in 10 C.F.R. § 2.309(f)(1)(i)-(vii). It is therefore flawed on its face. Although the petition makes a vague and unsupported allegation of some ongoing harm, the petitioner does not explain how the health of the Oglala Lakota could be adversely impacted by Crow Butte's operations or argue that Crow Butte's application is inadequate to protect public health and safety. There is no indication of any health effects or data to support such health effects from Crow Butte's operations. In short, there is no basis for this proposed contention. 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. "Notice" pleading is not permitted in NRC adjudications. *Seabrook*, CLI-99-6, 49 NRC at 219. Although the Commission insists on detailed descriptions of the petitioner's position on proposed contentions, none is provided here. *See Shieldalloy*, CLI-99-12, 49 NRC at 353.

For the above reasons, petitioner has failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The third environmental "contention" is therefore inadmissible and must be rejected.

4. *Fourth Environmental Contention (page 4) – "[W]ildlife are adversely affected by the operation of the Crow Butte Mine through the bioaccumulation of radioactive materials from the surrounding environment."*

The fourth environmental contention is inadmissible for wholly failing to address any of the factors in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The proposed contention is therefore flawed on its face. The petitioner makes vague allusions to bioaccumulation of radioactive material in wildlife (Pet., at 5), but does not explain how wildlife could be adversely impacted by Crow Butte's operation or argue that Crow Butte's application is inadequate to protect wildlife. There is no description of a potential mechanism of wildlife contamination, nor any data to support a claim of contamination. In short, the petition lacks any basis in law or fact. 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. "Notice" pleading is not permitted in NRC adjudications. *Seabrook*, CLI-99-6, 49 NRC at 219. The Commission insists on detailed descriptions of the petitioner's position on proposed contentions, but, here, petitioners have provided none. *Shieldalloy*, CLI-99-12, 49 NRC at 353.

For the above reasons, the petitioner has failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The fourth environmental "contention" is therefore inadmissible and must be rejected.

5. *First Miscellaneous Contention (page 5) – "[S]afety procedures imposed upon Applicant by the Nuclear Regulatory Commission, and Applicant's efforts at compliance with said procedures, are insufficient to adequately protect the land and water resources in the region, as evidence by current state of degradation."*

The first miscellaneous "contention" is inadmissible for failing to address any of the factors in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The proposed contention is therefore flawed procedurally and substantively. The petitioner makes vague references to resource protections

afforded by the United States and the NRC, but does not explain what safety procedures are inadequate or argue that Crow Butte's application fails to protect public health and safety. The petition does not reference any portion of the application that is alleged to be inadequate. Likewise, the petitioner fails to provide evidence regarding the alleged state of degradation. There is no basis for this proposed contention. 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. "Notice" pleading is not permitted in NRC adjudications. *Seabrook*, CLI-99-6, 49 NRC at 219. Rather, the Commission insists on detailed descriptions of the petitioner's position on proposed contentions. *Shieldalloy*, CLI-99-12, 49 NRC at 353.

For the above reasons, the petitioner has failed to satisfy the contention admissibility requirements in 10 C.F.R. § 2.309(f)(1)(i)-(vii). The first miscellaneous "contention" is therefore inadmissible and must be rejected.

6. *First Technical Contention (page 5) – "[T]he Crow Butte Mine facility admittedly consumes billions of gallons of fresh water annually, using it to conduct in situ leach mining of uranium and then returning it to the environment."*

The first technical "contention" asserts that changing the groundwater chemistry during the mining process amounts to permissible, slow-poisoning of water. Pet., at 5. Petitioners make non-specific and vague allusions to poisoning of water, but never articulate any link between the activities at Crow Butte and some impacts on surface water or groundwater. The contention does not specify which portion of the application it alleges to be inadequate or otherwise disputes. Nor does the proposed contention provide a basis or include any factual or expert support. Petitioners also argue that water which is returned to the aquifer is "consumed." Pet., at 5. In this regard, petitioners fail to understand that most of the water pumped by Crow Butte is "recycled." Based on a bleed of 0.5 percent to 1.5 percent which has been successfully

applied in the current Licensed Area, the vast majority (*e.g.*, on the order of 99 percent) of groundwater used in the mining process will be treated and re-injected. Application, at 3-20; *see also,* Figure 3.1-6 at 3-19. General statements that a matter ought to be considered without explaining what information in the application is deficient or how it should be changed are insufficient to support a contention.

Moreover, whether or not changing the geochemistry of the water amounts to consumption, petitioners have not shown that the issue is material to the findings that the NRC must make in order to issue the license. There is no correlation between this contention and any NRC regulatory requirements. If petitioners are arguing that NRC regulations should be changed to preclude changing the geochemistry of water, a license renewal proceeding is not the proper forum for such claims.[8] A petitioner's differing opinion as to what applicable regulations should (but do not) require cannot serve as a basis for a contention. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Ga.), LBP-95-6, 41 NRC 281, 303 (1995). Instead, the petitioner should submit a petition for rulemaking under 10 C.F.R. § 2.802.

Finally, the petitioner argues that the application should be denied until Crow Butte offers "conclusive proof" that the in situ leach mining of uranium does not affects ground or surface water. Pet., at 5-6. This turns the Commission's contention admissibility standard on its head. The petitioner has the burden of bringing contentions meeting the pleading requirements. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 422 (2001).

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[8] To the extent that petitioners are challenging actions permitted under the current NRC license, this is an impermissible challenge to already-authorized activities and is outside the scope of the license renewal proceeding.

For all the above reasons, the proposed technical "contention" is inadmissible for failing to address any of the admissibility criteria in 10 C.F.R. § 2.309(f)(1).

C. Discretionary Intervention Is Not Warranted

The petitioner also seeks discretionary intervention in the event that the Board finds no standing. Pet., at 6. This request should be denied. Under 10 C.F.R. § 2.309(e), a 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, specific 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 Delegation 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 22nd 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 DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL" 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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