August 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-MLA
	)	
(License Renewal Application)	)	
	)	ASLBP No. 08-

NRC STAFF RESPONSE IN OPPOSITION TO PETITIONERS' CONSOLIDATED REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE OF DEBRA WHITE PLUME, THOMAS K. COOK, LORETTA AFRAID OF BEAR COOK, DAYTON O. HYDE, BRUCE MCINTOSH, JOE AMERICAN HORSE, SR., BEATRICE LONG VISITOR HOLY DANCE, OWE AKU/BRING BACK THE WAY, AFRAID OF BEAR/COOK TIWAHE, AMERICAN HORSE TIOSPAYE AND WESTERN NEBRASKA RESOURCES COUNCIL

INTRODUCTION

Pursuant to 10 C.F.R. §2.309(h), the NRC Staff ("Staff") files this response to the above-listed petition for hearing/intervention and discretionary intervention filed on July 28, 2008. For the reasons explained in this response, the Staff submits that the petitions should be denied for (a) failing to comply with standing requirements set forth in 10 C.F.R. §2.309(d), and (b) failing to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, the Staff respectfully submits that Petitioners' requests for discretionary intervention fail to satisfy the requirements under 10 C.F.R. §2.309(e) and should be denied. Finally, the Petitioners' requests that 10 C.F.R. § 2.700, Subpart G procedures apply with respect to their hearing requests should also be denied.

BACKGROUND

Crow Butte Resources, Inc. (CBR) is licensed to operate an in situ leach (ISL) uranium

recovery facility in Crawford, Dawes County, Nebraska.[1] CBR was authorized by the NRC to extract uranium pursuant to Part 40 source material license. By letter dated November 27, 2007, CBR timely requested a renewal of its license that would allow the continued operation of its existing ISL operation. *See* ADAMS No. ML073470645. The Crawford facility is currently located approximately 4 miles southeast of Crawford, Dawes County, Nebraska, and encompasses approximately 3,300 acres. Uranium extraction occurs on approximately 1,100 acres of the site. Currently, five mine units are in operation; four mine units are in restoration; one mine unit is under development, and one mine unit has been restored. CBR subdivided the production zones into eleven separate mine units at the Crawford facility. According to CBR, almost 100% of the minerals leased in the Crawford site are on private lands, which is discussed in text and figures submitted in Section 1.3 of the application. The renewal request included a combined Technical and Environmental Report ("LRA"). After performing a mandatory 90-day acceptance review, the NRC Staff formally accepted CBR's application for review on March 28, 2008. *See* ADAMS No. ML080720341. A notice of an opportunity to request a hearing or petition to intervene was posted on the NRC website and published in the Federal Register on May 27, 2008, with a deadline for filing petitions of July 28, 2008[2].

On July 31, 2008, NRC Staff received by e-mail combined petitions from the following individuals and organizations: (1) Debra White Plume (individual), (2) Thomas K. Cook (individual), (3) Owe Aku/Bring Back the Way (Owe Aku), (4) Dayton O. Hyde (5) Bruce McIntosh, (6) Loretta Afraid of Bear Cook, (7) Joe American Horse, Sr., (8) Beatrice Long Visitor

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[1] CBR possesses a source materials license, SUA-1534.

[2] A previous notice was filed on April 7, 2008. The Staff, however, determined that a second notice should be published to include procedures to access sensitive unclassified information.

Holy Dance, and (9) Western Nebraska Resources Council (WNRC), (10) Afraid of Bear/Cook Tiwahe, (11) and American Horse Tiospaye.

DISCUSSION

I. Standing

A. Traditional 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); *see also* 42 U.S.C. § 2239(a) ("the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding"). 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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> (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
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> (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
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> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

In making a standing determination, the presiding officer is to "construe the [intervention] petition in favor of the petitioner." *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995). 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 statutes governing the proceeding: either the Atomic Energy Act or the National Environmental Policy Act of 1969 (as amended) 42 U.S.C. §§ 4321, *et seq*. (2000) (NEPA). *Quivira Mining Co.* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 6 (1998), *aff'd sub nom*. *Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999).

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, however, does not depend "on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible." *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75. Finally, the redressability element of standing requires a petitioner to show that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp*. (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

B. <u>"Proximity plus" standing requirements</u>

Although the Commission has historically presumed standing in power reactor construction permit and operating license proceedings based on a petitioner's proximity to the facility, *see, e.g., Virginia Elec. Power Co*. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979), a presumption of standing based on geographic proximity alone is not applied in materials licensing cases. 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." *See Sequoyah Fuels Corp.,* CLI-94-12, 40 NRC at 75 n. 22.

C. Organizational and representational standing

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 standing on its own behalf, it must satisfy the same standing requirements as an individual by showing a discrete institutional injury to the organization itself. *White Mesa*, CLI-01-21, 54 NRC at 252. 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 (such as by activities on or near the site), 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). The purpose of the third requirement is to ensure that an organization is truly representing the interests of the member and not "simply seeking the 'vindication of its own value preferences.'" *White Mesa*, CLI-01-21, 54 NRC at 250-51.

D. Discussion of Petitioners' Standing

1. Beatrice Long Visitor Holy Dance

Ms. Long Visitor Holy Dance does not state a basis for standing with sufficient

specificity to assert a "concrete and particularized" injury. Ms. Long Visitor Holy Dance makes several generalized statements regarding water and water use by the Lakota people, but never specifies that harm could come to her, individually, as a result of the ISL operation at the Crawford facility. Similarly, she states that "[w]ater is very sacred to our people, the Lakota" and that "Lakota people use water to make our medicines", but never specifies whether she uses the water for the same purpose or from where the water used to make medicines is drawn.

Also, Ms. Long Visitor Holy Dance cannot claim individual standing based on the interests of the Lakota people because one person cannot derive standing from the interests of another. *See Florida Power & Light Co*. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Other statements that relate to water use during ceremonies, such as inipi, Sun Dance, and Native American church ceremonies, also lack information regarding the water source for such ceremonies and a description that demonstrates a "concrete or particularized" injury that could result from the ISL operation in Crawford. Furthermore, the affidavit is not clear about the location of these ceremonies with regard to the ISL operation at Crawford.

Even if Ms. Long Visitor Holy Dance asserted standing based on a "proximity plus" assertion, Petitioner has not shown an injury that is fairly traceable to the challenged action. She states that her address is "P.O.B. Pine Ridge, SD 57770", but fails to provide a physical address to ascertain her location. Affidavit of Holy Dance at 1. A licensing board has previously found "that writing from a post office box and failing to provide a residential home address constituted part of the basis to deny standing in a petition to intervene." Id. (citing Int'l Uranium (USA) Corp. (White Mesa Uranium Mill; Alternate Feed Material), LBP 97-12, 46 NRC 1, 8 (1997), aff'd, CLI-98-6, 47 NRC 116 (1998)). She states that she lives at Slim Buttes, twenty miles from the Nebraska border on BIA 41, at Pine Ridge Indian Reservation, but never specifies her proximity to the ISL operation at the Crawford facility. Although she states that "our family land at Slim Buttes has several well pumps", she fails to specify the particular use of the well pumps by

herself or her family or from where these pumps draw water. She only declares that "[a] tributary of the White River flows through our family land, but admits that the tributary has run dry", thereby voiding any claim of an injury in fact or threat of potential injury. Affidavit of Holy Dance at 1. In short, she never provides a plausible basis or points to any evidence that shows that water from the facility will travel over 50 miles in a manner sufficient to cause harm in South Dakota.[3] Additionally, she fails to identify any information demonstrating a significant source of radioactivity that produces an obvious potential for offsite consequences. Affidavit of Holy Dance at p.1. *See* Georgia Tech, CLI-95-12, 42 NRC at 116. Absent an obvious potential for harm, "it becomes [petitioner's] burden to provide a 'specific and plausible' explanation of how the action will affect her." *See Nuclear Fuel Servs., Inc*. (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (finding no obvious potential for harm at petitioner's property 20 miles from the site of a facility that converted high-enriched uranium to low-enriched uranium). Mere conclusory allegations about potential harm to the petitioner or others are not sufficient. *Id*. Because Ms. Long Visitor Holy Dance has failed to show either an injury in fact or a basis for standing based on proximity to the site, her petition should be rejected.

2. Buffalo Bruce

Mr. Bruce does not state with sufficient particularity how he will be harmed by the granting of the license renewal to meet requirements of representational standing or individual standing. Although he declares his membership, authorizes Western Nebraska Resources Council ("WNRC") to represent his interests, and provides his name, he does not provide any

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[3] Lacking any specifics on Ms. Long Visitor Holy Dance's physical location, the Staff calculated the distance between Crawford, Nebraska and Slim Buttes in Pine Ridge, South Dakota, using the distance calculator at http://www.infoplease.com/atlas/calculate-distance.html. This calculator uses the latitude and longitude of two cities to determine the distance "as the crow flies" between them. *Id*. The resulting distance was 50 miles (97.9 km).

information regarding the location of his residence nor does he indicate whether he will be harmed by the granting of the license renewal. Affidavit of Buffalo Bruce at 1. He only states that his mailing address is 205 North Mears St., Chadron, NE 69337 and that he "authorizes WNRC to represent my interests in this proceeding", but fails to explain what those interests are. Affidavit of Buffalo Bruce at 1. He describes the activity of ancestors such as his grandfather in 1890's and his family's long history in the area of Chadron, Nebraska but does not describe his own activity in the area of ISL operation at Crawford, Nebraska or what harm could come to him from the facility's operations. Petition at 12. The rest of his affidavit briefly discusses his professional fieldwork and research performed in Nebraska, but it lacks any specifics about how he would be harmed by the Applicant's ISL operation at Crawford, Nebraska[4]. 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…" *N. States Power Co*. (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI), CLI-00-14, 52 NRC 37, 47 (2000). Because Mr. Bruce's affidavit fails to meet the requirement under representational standing that any attempt by WNRC to assert representational standing based on Mr. Bruce's membership should be rejected. Because Mr. Bruce cannot show a basis for standing individually, his petition should be denied.

3. <u>Dayton O. Hyde</u>

Mr. Hyde states that his address is P.O. Box 998, Hot Springs, South Dakota 57747 and that he has lived at this address for more than twenty years. Affidavit Hyde at 1. He further states that he is the founder of the Black Hills Wild Horse Sanctuary located on 11,000 acres along the Cheyenne River between Hot Springs and Edgement, South Dakota. He claims that

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as a steward of the wild horses, he is concerned that bioaccumulation of radionuclides in the food chain may harm animals and about the health of the horses and suitability of the land and continued availability of clean water quality from our wells and from the Cheyenne River. Petition at 12; Affidavit of Hyde at 1. However, he submitted his petition on his own behalf, not on behalf of the Black Hills Wild Horse Sanctuary. Mr. Hyde cannot claim individual standing based on the interests of the Black Hills Sanctuary, because one person cannot derive standing based on the interests of another. *See Florida Power & Light Co*. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).

In addition, Mr. Hyde fails to establish "proximity plus" standing. Mr. Hyde's statements in his affidavit that "as a resident of South Dakota, I question what authority the Nebraska Department of Environmental Quality [NDEQ] has over the regulation of my water quality" and that "NDEQ sets the water restoration standards for the Mine and that such standards may affect me" provides insufficient information to demonstrate that there is an "obvious potential for offsite consequences." *Georgia Tech*, CLI-95-12, 42 NRC at 116; Affidavit of Hyde at 2. Mr. Hyde does not describe from where he draws his water, water uses or how renewal of the license presents a harm to him that is fairly traceable to the ISL operation in Crawford, Nebraska. In addition, he provides no specific address information to ascertain the location of his property and its distance from the ISL operation at Crawford. A post office box is not sufficiently specific address information. Either a street address or other specific location information is needed. *See* International Uranium (USA) Corp. (White Mesa Uranium Mill), LBP-97-12, 46 NRC 1, 6-7 (1997).

Additionally, Mr. Hyde states in his affidavit that the Applicant "predicts that its operations will increase the public dose of radiation to the entire North American population…" and that "such increase, taken together with the existing exposures to radiation in my region (such as the infamous contamination due to historic open pit mining in Edgement, SD, create a

major risk of bioaccumulation of radionuclides". Contrary to this claim, the application provides data, which demonstrates that doses to the nearest residences from the ISL operation at Crawford will be significantly less than the 100 mrem/yr public dose limit specified in 10 CFR 20.1301. *See* LRA Section 7.12. Thus, a distance of 52 miles[5] does not appear to be close enough to this ISL operation at Crawford for there to be an obvious potential for offsite consequences; let alone any consequences attributable to the renewal under consideration here. In *Nuclear Fuel Services,* the Commission affirmed a licensing board's determination that a distance of 20 miles was insufficient to establish a presumption of standing for a facility that stored high-enriched uranium, a more significant source of radioactivity than the unenriched uranium at issue here. CLI-04-13, 59 NRC at 248. For the reasons stated above for Mr. Hyde, these allegations do not show an injury in fact with sufficient specificity to establish standing.

4. Joe American Horse, Sr.

In support of his standing, Mr. American Horse states that his address is "POB 941, Pine Ridge, South Dakota 57770", and that "he participates for at least 20 continuous years in the inipi, or "sweat lodge" ceremony at Slim Buttes, Pine Ridge Indian Reservation". Petition at 9; Affidavit of American Horse, Sr. at 1. His claim does not establish standing for several reasons. First, he does not state that water from these wells or the White River is used in the ceremonies. Second, he does not describe a concrete or particularized injury that could result from the ISL operation at Crawford, Nebraska while participating in the ceremonies at Slim Buttes which is 40 miles from Crawford, Nebraska. He states that the wells at Slim Buttes draws water from the

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[5] Lacking any specifics on Mr. Hyde's physical location, the Staff calculated the distance between Crawford, Nebraska and Hot Springs, South Dakota, using the distance calculator at http://www.infoplease.com/atlas/calculate-distance.html. This calculator uses the latitude and longitude of two cities to determine the distance "as the crow flies" between them. *Id*. The resulting distance was 52 miles (97.9 km)

Arikaree aquifer but fails to identify information that describes a plausible basis or points to any evidence that the Arikaree aquifer is or has been impacted by the ISL operation at Crawford[6].

Further, Mr. American Horse cannot meet the proximity plus requirements to establish standing. As addressed earlier with regard to Mr. Hyde's standing, a post office box is insufficient to ascertain the location of his property and the distance to the ISL operation at Crawford, Nebraska. Assuming he lives in Pine Ridge, South Dakota, which his approximately 50 miles from Crawford, Nebraska, this is insufficient to establish an obvious off-site consequence. Finally, Mr. American Horse provides extensive information regarding his family's history, water and treaty rights of the Oglala Sioux Tribe and the Lakota, legal mechanisms related to the Nebraska State Historical Preservation Officer, the Winters' Doctrine and other statements that are clearly unrelated to his individual standing. Affidavit of American Horse, Sr. at 1-3. Because Mr. American Horse cannot establish an injury in fact or state a concrete and particularized claim, his petition should be rejected.

5. Loretta Afraid of Bear Cook

Mrs. Cook fails to state a concrete and particularized injury to herself that is fairly traceable to the ISL operation at Crawford, Nebraska. She attempts to assert standing on the basis that she was born and raised at Slim Buttes and lived there for a short time in 1983, but she also admits that she moved a year later to Chadron, Nebraska events that occurred a few years prior to the commercial ISL operation at Crawford in 1991. She states that she played and bathed in White River, but this occurred when she was a child. She also states that her

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[6] According to the license renewal application, the produced aquifer is located in the Basal Chadron. The Arikaree aquifer is part of the Arikaree Group at the High Plains Aquifer at Pine Ridge, South Dakota, and is hydraulically unconnected to the Basal Chadron aquifer that exists at the Crawford, Nebraska, site. *See* LRA Section 2.7.2.3 at 2-153 for aquifer test results.

daughter was diagnosed with a skin disease in 1983 related to allergic reactions to contaminants in groundwater and river water, but, since initial operations took place, her statements make it improbable that the ISL operation at Crawford contributed to her daughter's diagnosis. More importantly, she admits that her daughter's prognosis improved a year later when the family moved to Chadron, Nebraska. While she states that "[t]o this day, Sakakohe remains sensitive, bruises and welts easily…to deal with her environmental illness", she points to no evidence that the continued problems are attributable to the ISL operation at Crawford, Nebraska. Further, she submitted the petition on her own behalf, not her daughter's, and the petition does not demonstrate that her daughter is a minor. Furthermore, Mrs. Cook cannot base her individual standing by deriving the standing based on the interests of another. *See Florida Power & Light Co*. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). In short, none of her statements describes a current injury in fact or a particularized harm that is traceable to the current ISL operation at Crawford.

Further, she states in her affidavit that she "participated for at least 20 continuous years in the inipi, or ('Sweat Lodge') ceremony at Slim Buttes community on the reservation". Affidavit of Afraid of Bear Cook at 2. She also claims that Slim Buttes is located along the White River and the wells at Slim Buttes draw water from the Arikaree aquifer. However, she fails to identify information that describes a plausible basis or points to any evidence that demonstrates how the Arikaree aquifer is impacted by the ISL operation at Crawford.

Finally, Mrs. Cook cannot meet the "proximity plus" standard to establish standing. She states that her address is 1705 S. Maple Street, Chadron, NE, 69337. Affidavit of Afraid of Bear Cook at 1. However, she provides no specifics regarding any potential for off-site consequences of the ISL operation at Crawford to her at this location. Like Mr. American Horse, Mrs. Cook's statements regarding her family's history, water and treaty rights of the Oglala Sioux Tribe and the Lakota, opinions related to the jurisdictional authority of the Nebraska State

Historical Preservation Officer, the Winters' Doctrine and other statements that are clearly unrelated to her individual standing and are not sufficient to establish individual standing. Affidavit of Afraid of Bear Cook at 1-3. Because Mrs. Cook cannot establish an injury in fact or state a concrete and particularized claim, her petition should be rejected.

6. Thomas Kanatakeniate Cook

Mr. Cook's standing claim suffers from the same inadequacies as Mr. American Horse and Mrs. Cook. He states that he and his wife own real estate and maintain homes both in Chadron and on the Pine Ridge Reservation which is located in Pine Ridge, South Dakota[7]. He states in the petition on page 10 that he has "been on the Pine Ridge Reservation for 35 years...". Petition at 10. He also claims that he participates in the ceremonies at Alottment #1144 for 35 years which traverses the White River and that "our two wells there draw water from the Arikaree aquifer". Affidavit of Cook at 2. However, he admits that the ceremonies used well water until the "water pipeline reached Allottment #1144 in the mid 1990's", which indicates that any claim of injury is no longer viable for purposes of establishing standing. Affidavit of Cook at 2. He does not point to any evidence or plausible basis that water from the current ISL operation is impacting his water quality at Pine Ridge Reservation, approximately 40 miles away from Crawford, Nebraska.

Like Mrs. Cook, he makes identical statements regarding his daughter's diagnosis, which is not shown to be related to the ISL operation at Crawford, Nebraska. He also states that "[d]uring the eight years that he and his family lived at Slim Buttes, they used a 30 foot groundwater well in the Arikaree and used water from the White River on a daily basis". Petition

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[7] It is unclear as to whether the home in Chadron, Nebraska is the same as the mailing address stated in his affidavit as 1705 South Maple Street, Chadron, NE 69337.

at 10,11. However, he fails to state whether he uses water from the 30 foot well today or water from the White River today. Any claim of an injury of fact from the White River seems improbable because Mr. Cook admits that the "White River has run completely dry in only two years - 2007 and 2008". Petition at 11. Even if Mr. Cook used the Arikaree aquifer as a water source today, he does not identify a plausible means or points to any evidence that water from the ISL operation has or would travel to his well at Slim Buttes which is 40 miles away in Pine Ridge, South Dakota.

Additionally, like Mrs. Cook, he makes numerous statements regarding his family's history, water and treaty rights of the Oglala Sioux Tribe and the Lakota, opinions related to the jurisdictional authority of the Nebraska State Historical Preservation Officer, the Winters' Doctrine and other statements that are clearly unrelated to his individual standing, and are not appropriate to establish individual standing. Affidavit of Cook at 1-4.

Finally, any discussions related to organizations such as Running Strong for American Indian Youth, which drills water wells for families and has made close to 400 such wells across the reservation is inadequate to confer standing on Mr. Cook. Affidavit of Cook at 3-4. Mr. Cook cannot claim individual standing based on the interests of the organization or the people it services, because one person cannot derive standing based on the interests of another. *See Florida Power & Light Co*. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). Because he cannot state a current harm or injury in fact that is fairly traceable to the ISL operation at Crawford, his petition should be rejected.

7. Debra White Plume[8]

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[8] The Atomic Safety and Licensing Board in a separate proceeding related to the Applicant's North Trend Expansion involving similar Petitioners found standing for Ms. White Plume. See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Owe Aku, Bring Back the (continued. . .)

Ms. White Plume states that her address is "Box 71, Manderson, South Dakota. 57756". Affidavit of White Plume at 1. Ms. White Plume bases her standing argument on several generalized statements---but she never describes how any alleged harm will occur. For example, she claims that she drinks water from "a private well in the Arikaree aquifer" and that "there is no 'wall' that separates our drinking water, protecting it from the water the corporation Cameco Resources is mixing up with uranium and its decay products." Affidavit of White Plume at 2. But, she fails to explain or identify information in the LRA that shows a plausible means by which "uranium and its decay products" would travel to her in Manderson, South Dakota and cause her harm.[9] According to LRA Section 2.7.2.3, the Arikaree aquifer is part of a formation that is not hydraulically connected to the Brule and Chadron aquifers.

Similarly, she states that "[w]e breathe air that can be made to carry deadly radon from Cameco corporate mining, we have high winds and are down wind from the Crow Butte Uranium mine", but she never specifies where in the LRA it shows that there is any possibility that radon will travel downwind to her in Mandersen, South Dakota. Additionally, she fails to provide her physical address to ascertain whether she resides downwind from the facility in a location to breathe such air. Contrary to this claim, the LRA provides data, which demonstrates that doses to the nearest residences from ISL operation at Crawford, Nebraska will be

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(. . .continued)

Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 N.R.C. ___, (Apr. 29, 2008) (slip op.). However, the Staff appealed to the Commission the Board's decision to admit her as party in that proceeding. *See* ADAMS No. ML081330210. To date, the Commission has not issued a decision.

[9] Lacking any specifics on Ms. White Plume's physical location, the Staff calculated the distance between Crawford, Nebraska and Manderson, South Dakota, using the distance calculator at http://www.infoplease.com/atlas/calculate-distance.html. This calculator uses the latitude and longitude of two cities to determine the distance "as the crow flies" between them. *Id*. The resulting distance was 60.8 miles (97.9 km).

significantly less than the 100 mrem/yr public dose limit specified in 10 CFR 20.1301. *See* LRA Section 7.12 . Contrast Ms. Plume's location at distance of approximately 60 miles from the facility. Absent an obvious potential for harm, "it becomes [petitioner's] burden to provide a 'specific and plausible' explanation of how the action will affect her." *See Nuclear Fuel Servs., Inc*. (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004) (finding no obvious potential for harm at petitioner's property 20 miles from the site of a facility that converted high-enriched uranium to low-enriched uranium). Mere conclusory allegations about potential harm to the petitioner or others are not sufficient. *Id*. Finally, Ms. White Plume makes general claims that "this corporate act threatens my future, my health, my water source and that of my family and generations and they want to be able to continue to waste water for many more years." Affidavit of White Plume at 2. However, she provides no information or identifies how the ISL operation at Crawford threatens her health. Because Ms. White Plume has failed to show either an injury in fact or a basis for standing, her petition should be denied.

8. Debra White Plume/Owe Aku[10]

Debra White Plume, who is also an individual petitioner (see Section D. 7 above), joins in this consolidated petition as Director of Owe Aku, Bring Back the Way (OA), a non-governmental organization "dedicated to the preservation and revitalization of the Lakota Way of Life." Affidavit of OA at 1. It is unclear whether Ms. White Plume is asserting organizational standing on behalf of Owe Aku or representational standing because she states in the OA

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[10] The Atomic Safety and Licensing Board in a separate proceeding related to the Applicant's North Trend Expansion involving similar Petitioners found standing for Owe Aku. See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Owe Aku, Bring Back the Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 N.R.C. ___, (Apr. 29, 2008) (slip op.). However, the Staff appealed to the Commission the Board's decision to admit them as party in that proceeding. *See* ADAMS No. ML081330210. To date, the Commission has not issued a decision.

affidavit that she has "authorized attorneys Bruce Ellison…to represent me in this matter." Affidavit of OA at 1. In either case, there are insufficient grounds to grant standing. To obtain standing on its own behalf, OA must show "either an immediate or threatened injury to its organizational interests or to the interests of identified members." *Georgia Tech,* CLI-95-12, 42 NRC at 115. In this case, OA never shows how its interest in preserving and revitalizing the Lakota way of life is harmed by the ISL operation at Crawford. She states that Owe Aku is concerned with the Cameco uranium mining and milling activities…near Crawford, Nebraska that is only 30 miles away [from] our nearest border". Affidavit of OA at 1. In this regard, she alleges that "Cameco corporation is doing business that impacts our ground water, has many leaks and spills in Crawford and everywhere they mine…". Affidavit of OA at 2. She fails, however, to specify the location of presumably, OA, or identify specific members whose groundwater is impacted by leaks and spills from the ISL operation at Crawford. Further, she provides no information regarding how leaks and spills could potentially impact groundwater of members of the Lakota at these undisclosed locations or identifies the source of groundwater at issue. Moreover, she points to no information in the LRA or otherwise that demonstrates a plausible means by which contaminants from spills and leaks would travel to the undisclosed location of these unidentified members or Owe Aku. According to her individual affidavit, Owe Aku is presumably located at her location in Mandersen, South Dakota which is over 60 miles away and draws water from the Arikaree aquifer, which is not connected to the Chadron and Brule aquifers. Further evidence of Ms. White Plume's failure to articulate a concrete and particularized injury lies in her claim that "our people have high cancer and diabetes which we believe may be impacted by high rads and arsenic in our water…". Affidavit of OA at 2. But, she admits in the same statement, however, that she has no information to support this belief because she asks "did the rads and arsenic come from Cameco mining activities?". Affidavit of OA at 2. In short, Ms. White Plume makes many generalized statements but fails to state with

sufficient particularity a concrete or particularized harm to the interests of Owe Aku. For an organization to assert standing on its own behalf, it must satisfy the same standing requirements as an individual by showing a discrete institutional injury to the organization itself. *See* White Mesa, CLI-01-21, 54 NRC at 252. Because OA cannot articulate an injury in fact or basis for standing, its petition should be denied.

Besides Ms. White Plume the only other information provided in support of Owe Aku is by Lester "Bo" Davis, an additional affiant, who does not appear to be a member of Owe Aku. Mr. Davis states "I make this affidavit in support of Owe Aku (Bring Back the Way)" and that he has "authorized attorney Bruce Ellison through Owe Aku to represent his interests in this proceeding". Affidavit of Davis at 1. Mr. Davis, however, fails to allege that he is a member of Owe Aku, which is required to establish representational standing. In any event, Mr. Davis cannot meet the "proximity plus" standard. He states that his address is "P.O. Box #1802 Pine Ridge, SD 57770" and that he lives less than 100 yards away from White River. Affidavit of Davis at 1. As the Staff stated in previous sections of this response, a post office address is insufficient to ascertain location and distance to the ISL operation in Crawford, Nebraska. Lacking any specifics as to his physical location in Pine Ridge near the White River, he relates that he has "fished and bathed in the White River throughout my entire life, and hunted animals that drink and live along the White River" and expresses concern that "he may be affected by any pollution in the White River from this mine." Affidavit of Davis at 1. However, he fails to identify how the ISL operation has polluted the White River or identify how the ISL operation at the Crawford, Nebraska location might cause him harm at his undisclosed location. Further, he asserts that he uses water for ceremonies at Slim Buttes which draws water from wells in the Arikaree aquifer and that "he regularly breathes in such water vapor", but fails to identify a plausible means by which the Arikaree would be impacted by the ISL operation at Crawford. For the reasons stated above, these interests are not concrete and particularized enough to

confer standing to either an individual or organization. OA has also failed to satisfy the requirements for representational standing. Even if the Board were to consider Mr. Davis as a member, the petition is still deficient. Therefore, the OA petition should be denied.

9. Afraid of Bear/Cook Tiwahe, by Thomas Kanatakeniate Cook

The Cook Tiwahe is defined as a family comprised of the married couple Thomas K. Cook, Loretta Afraid of Bear cook, Loretta's mother, Beatrice Long Visitor Holy Dance, and their children. Petition at 13. Essentially, the Cook Tiwahe is attempting to establish standing using organizational and representational standing requirements by asserting injury to one of its members and to its organizational interests. First, the Cook Tiwahe states that Sakakohe Afraid of Bear cook suffers from an environmental illness related to contamination of the water at Slim Buttes. Petition at 13. However, they fail to identify information or any plausible means by which the current ISL operation impacted water at Slim Buttes to cause Sakakohe's environmental illness. More importantly, according to the affidavit of Thomas Cook, she was diagnosed in 1983, a few years prior to the ISL operation at Crawford, Nebraska. Thus, without information from the Cook Tiwahe demonstrating otherwise, they cannot demonstrate a concrete or particularized injury to Sakakohe that is fairly traceable to the ISL operation at Crawford, Nebraska. Additionally, it is unclear whether Sakakohe is a minor or adult to determine whether she has the capacity to authorize permission to represent her in this proceeding. Second, they cannot show an immediate or threatened injury to their interests. The family states that they were forced to move away from their family lands but fail to provide any specifics as to when this occurred. Therefore, any claim of an immediate or threatened harm to the family's interest cannot be supported. Petition at 13. Petitioners also state that the "Tiwahe has also suffered harm from environmental pollution of the groundwater from the Arikaree, surface waters and the White River". However, they fail to disclose the location of all the members to ascertain their location, and specifics regarding what harm they have suffered.

Moreover, they fail to identify information that supports their assertion that the Arikaree aquifer, surface waters, and the White River is contaminated or a plausible means by which the contamination would travel to their location and cause them harm. Petition at 13. Finally, the Tiwahe has not provided proof of permission to represent such members in this proceeding or that the children referred to are minor children or adults capable of asserting standing on their own behalf. The Tiwahe must satisfy the same standing requirements as an individual 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, or a discrete institutional injury to the organization itself. *See* White *Mesa*, CLI-01-21, 54 NRC at 252. Because the Tiwahe has not demonstrated standing on its own behalf or representational standing, its petition should be denied.

10. American Horse Tiospaye, By Joe American Horse, Sr.

The American Horse Tiospaye which is an extended family made up of related families to Joe American Horse, Sr. and his brothers suffer from the same flaws as the Cook Tiwahe. Petition at 13. The Tiospaye assert that they suffer from contamination of groundwater and surface water in and around Pine Ridge Indian Reservation, but fail to describe the harm suffered or provide evidence that the alleged groundwater contamination originates from the Crawford, Nebraska facility. Further, they fail to identify information to support a plausible means by which contamination from the ISL operation, which is located 40 miles from Pine Ridge, South Dakota, would travel to the reservation to cause them harm. They fail to provide specifics of the location of the related families of Joe American Horse and his brothers to ascertain their location "in and around Pine Ridge Reservation". Petition at 13. For an organization to assert standing on its own behalf, it must satisfy the same standing requirements as an individual by showing a discrete institutional injury to the organization itself. *See* White Mesa, CLI-01-21, 54 NRC at 252. Because the Tiospaye has not demonstrated a

particularized injury, the petition fails to provide a basis for organizational standing and should be dismissed. Even if the Tiospaye asserted representational standing, based on the foregoing information, they would not meet the requirements.

11. Western Nebraska Resources Council by Bruce McIntosh, Vice-Chairman (WNRC)

WNRC states that it is a Nebraska non-profit which was formed in 1983 to protect the natural resources of Western Nebraska with a focus on groundwater contamination from uranium mining. However, it fails to state a sufficiently concrete and particularized harm to provide a basis for granting organizational standing. Their claim that "WNRC was found to have standing and admissible contentions in the Expansion Proceeding. See, LBP-0806" is insufficient for the purpose of establishing standing related to the Crawford, Nebraska site in this license renewal proceeding because standing established in another proceeding cannot be used to establish standing in the current proceeding. Petition at 14. Furthermore, WNRC's claim is misleading because as they point out, WNRC was admitted in the proceeding related to the North Trend amendment on the basis of representational standing of Dr. Anders, who has not petitioned or provided proof of permission to be represented by the WNRC in the license renewal proceeding[11]. WNRC is asserting organizational standing in this proceeding, therefore, WNRC must show some discrete institutional injury in order to be granted standing. Further, WNRC cannot claim representational standing because the petitioner, Bruce McIntosh, authorizing WNRC to represent his interest is unable to establish individual standing. The Staff addressed Mr. Bruce McIntosh's standing in a previous section of this response and will not

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[11] See Memorandum and Order (Ruling on Standing and Contentions of Petitioners Owe Aku, Bring Back the Way; Western Nebraska Resources Council; Slim Buttes Agricultural Development Corporation; Debra L. White Plume; and Thomas Kanatakeniate Cook), LBP-08-06, 67 N.R.C. ___, at 46 (Apr. 29, 2008) (slip op.).

reiterate the discussion here. Because WNRC has not met the requirements for organizational or representational standing, its petition should be denied.

In sum, none of the Petitioners have established standing, and therefore, their petitions should be denied.

II. Experts, Supporting Documentation and References

The Staff submits that the Board should reject any consideration of certain documents attached to the Petition. The Commission's rules on contention admissibility are very strict and all petitioners are required to adhere to the rules. The Commission has stated that a simple reference to a large number of documents does not provide a sufficient basis for a contention. An intervener must clearly identify and summarize the incidents being relied upon, and identify and append specific portions of documents. See Commonwealth Edison Co., (Braidwood Nuclear Power Station, units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (185), rev'd and remanded on other grounds, CLI-86-8, 23 NRC 241 (1986), citing Tennessee Valley authority (Browns Ferry Nuclear Plant, units 1 and 2), LBP-76-10, 3 NRC 200, 216 (1976)

While some of the documents in this section of the Petition are cited in the contentions, the Staff is unclear as to the relevance of others. The Staff cannot assume what aspects of the LRA the Petitioners dispute and the different parts of the supporting material on which they rely. It is neither the Staff's nor the Board's role to provide information on the Petitioners' behalf. Thus, the Staff requests that all documents not relied on or clearly explained as to the relevance to the contentions asserted and the purported deficiencies in the LRA be rejected and disregarded. The following list of are some of the documents that should be disregarded for failing to cite the document or portions thereof that are applicable to the contentions asserted herein in this licensing proceeding.

1. Source Documents (Petition at 4.)

Environmental Assessment, Monitoring and Remediation of Uranium Mining: An

Independent Reflection on the Role of Community and Advocacy Groups

Nebraska Department of Environmental Quality v. Crow Butte Resources, Inc., Complaint and Consent Decree, District of Lancaster County, NE

2. Incorporation of Publicly Filed Documents by Reference (Petition at 5, 6.)

Torrell, L., et. al, The Market Value of Water in the Ogallala Aquifer

Revised Lithostratigraphy of Late Paleogene and Neogene Strata of the High Plains Aquifer in Western Nebraska

Uranium ISL Ground-Water Data from Written Testimony of William P. Staub

Answer to Staff's Notice of Appeal & Opp. To Interlocutory Review
Answer to Applicant's Notice of Appeal & Opp. To Interlocutory Review
April 29th, Memo and Order
Reply in support of Motion to File a brief amicus curiae
Center for Water Advocacy, RtE, and Robert Lippman
Response to NRC Brief regarding treaties, etc.
Response to Applicant's Brief regarding treaties, etc.
Affidavit of Winona LaDuke
Affidavit of Rita Long Visitor Holy Dance
Notice of Appearance and Leave to File Brief Amicus Curiae
Center for Water Advocacy, RtE, and Robert Lippman
Affidavit of Beatrice Long Visitor Holy Dance
OST's Brief of Amicus Curiae
Memo of Law regarding Indigenous Rights, Treaties and Indian Law
Affidavit of Mona Ann Polacca
Affidavit of Flordemayo
Affidavit of Harvey Whitewoman
Combined Reply to NRC & Applicant's Responses to Exhibits A & B
Supplemental Affidavits of Dr. Francis E. Anders and Beth Ranger
Supplemental Affidavit of Janet Mize
Affidavits of David Alan House, Sandy Sauser, & Lester "Bo" J. Davis
Corrected Reference Petition (w/ copy of original)
Reply to NRC Response to Petition of Owe Aku & Debra White Plume
Reply to Applicant's Response
Affidavits in Support of Slim Buttes Agri. Dev. Corp. & WRNC
By Joseph R. American Horse, Sr., Thomas K. Cook, Francis E. Anders, Bruce McIntosh, Janet Mize, and Beth Ranger
Reply to CBR Response to Petitioner Owe Aku & Debra White Plume
Reply to NRC Staff Response
Submitted by T. K. Cook, SBADC & WRNC
Intervenor Exhibit B, Tech. Review of Aquifer Exemption Petition

3. Publicly Available References (Petition at 6, 7.)

Climactic and Hydrologic Trends in the Western U.S.

Climate Change 2007: Synthesis Report, An Assessment of the Intergovernmental Panel on Climate Change

Climate Change, Water Quality and the Future

Ionizing Radiation from Nuclear Power and Weapons and Its Impacts on Animals

International Covenant on Civil and Political Rights (ICCR)

American Indian Religious Freedom Act Religious Freedom Act Restoration Act

Native American Graves Protection and Repatriation Act

Government to Government Relations…

Executive Order No. 13175

M.C. Woods, Indian Land and the promise of Native American Sovereignty

III. Petitioners' Requests for Discretionary Intervention Should be Rejected because they assert 2.309(d).

Petitioners seek discretionary intervention in the event that the Board finds that the petition for leave to intervene, as a matter of right, is denied. Petition at 8. Based on the reasons set forth in this section, the Staff requests that the Board deny each petitioner's request. Pursuant to 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."). Furthermore, in addition to the "one admissible contention-one party requirement," the petition must also address several requirements for eligibility. 10 C.F.R. §2.309(e) requires that in addition to addressing the standing requirements under section 2.309(d)(1), the initial petition for hearing must address: 1) factors weighing in favor of allowing intervention, and 2) factors weighing against allowing

intervention. At this juncture, no petitioner established the requisite standing to intervene in these proceedings. Indeed, as explained in the staff's response to the contentions, the staff does not believe any petition has satisfied the requirement for admission of a contention, even if standing was assumed. More importantly, however, if the Board determines later that consideration of discretionary intervention is appropriate, the Petitioners' request should be denied because they fail to address in the initial petition the factors listed in section 2.309(e). Consequently, the Board should deny the request for discretionary intervention.

III. Legal Requirements for 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). For each contention, the petitioner must provide: (1) a specific statement of the issue of law or fact to be raised; (2) a brief explanation of the basis for the contention; (3) a demonstration that the issue raised in the contention is within the scope of the proceeding; (4) a demonstration 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; (5) a concise statement of the alleged facts or expert opinions which support the requestor's position; and (6) sufficient information to show that a genuine dispute exists on a material issue of law or fact, including references to specific portions of the application that the petitioner disputes and the supporting reasons for each dispute or the identification of each failure to include necessary information in the application and the supporting reasons for the petitioner's belief. 10 C.F.R. § 2.309(f)(1); *see also USEC, Inc*. (American Centrifuge Plant), CLI-04-30, 60 NRC 426, 429 (2004).

The contention rule is "strict by design," *see Dominion Nuclear Connecticut, 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) ("LES"). 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 Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). Likewise, Commission practice does not "permit 'notice pleading,' with details to be filled in later." *Id.*

To be admissible, contentions must fall within the scope of the proceeding as defined by the notice of hearing. *See Florida Power and Light Co*. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000); *LES*, LBP-04-14, 60 NRC at 55. Moreover, a contention must present a genuine dispute with the applicant on a material issue of law or fact, and any contention that fails directly to controvert the application or that mistakenly asserts the application does not address a relevant issue can be dismissed. *See Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993), *review declined*, CLI-94-2, 39 NRC 91 (1994). The petitioner must present the factual information and expert opinions necessary to support its contention adequately. *See Georgia Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305, *vacated in part and remanded on other grounds*, CLI-95-10, 42 NRC 1, *aff'd in part*, CLI-95-12, 42 NRC 111 (1995). Neither mere speculation nor bare assertions alleging that a matter should be considered will suffice to allow the admission of a proffered contention. *See Fansteel, Inc*. (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). If a petitioner neglects to provide the requisite support for its contentions, it is not within the Board's power to make assumptions of fact that favor the petitioner. *See Georgia Tech*, LBP-95-6, 41 NRC at 305.

A. Response to Petitioners' "Relevant Facts"

In the Petition at page 15, Petitioners offer "Relevant Facts and Positions." These

"relevant facts", however, are for the most part, speculation and conjecture that are not properly supported with documents, expert opinion, or in the application as required under 10 C.F.R. § 2.309(f)(1). The Board should note that many of the "relevant facts" are repeated throughout Petitioners' proffered contentions. While Petitioners cite various opinions as support for the "relevant facts", they fail to cite specific portions of the opinions or identify how these opinions relate to the "relevant facts"[12].

> (1) The LRA is incomplete, missing page 3-22. This claim is addressed in the contentions section of the Staff's response.
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> (2) Allegations of concealment are addressed in response to the contentions on foreign ownership, control and dominance. The opinions referenced do not support this claim.
>
> (2) The LRA states that the Applicant/Licensee is using 4, 000 gallons, however, they are licensed to use 9,000 gallons per minute. Actually LRA states 47 million. *See* LRA Section 3.1.3 page 3-6. Additionally, the Petitioners statement that CBR wants to use another 4,500 gallons is associated with the North Trend Amendment.
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> (3) Petitioners provide no support and the opinions discussed do not support those conclusions
>
> (4) It is unclear whether the opinions referenced do not provide support these assertions. The relevance to the Contentions and the LRA are not explained nor is the report referenced in the contentions.
>
> (5) Petitioners have not cited sufficient support for this claim.
>
> (6) Petitioners have not cited sufficient support for this claim
>
> (7) Petitioners have not cited sufficient support for this claim.
>
> (8) Petitioners have not cited sufficient support for this claim.

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[12] While the Robinson opinion is cited as a general reference to this section, the Staff could not determine all of the different aspects of the opinion relied on by the Petitioners. The Staff did examine the opinion and determined that it failed to raise genuine disputes of fact or law with the LRA. To the extent that sections clearly related to a contention raised, the Staff addressed these in the contention sections.

(9) It is outside the scope of these proceedings because UN declarations are not binding or immaterial to the Staff's review. It is not a treaty, international agreement, a statement of law, or a legal obligation. *In re*Alien Children Education Litigation, 501 F. Supp. 544, 593 (D. Tex. 1980) (quoting statement of Mrs. Franklin Roosevelt, then US representative in the General Assembly, concerning adoption of the U.N. Declaration of Human Rights in 1948). The NRC has no authority to enforce a declaration. Treaty rights of consultation are also not binding on the NRC because the NHPA mandates that the NRC initiate a consultation process. Additionally, the Petitioners fail to cite any of the foregoing documents in a contention. To the extent that Petitioners may be relying on Executive Order 13175, as cited in the "Source Documents" section of the Petition, they cannot rely on it because the order explicitly exempts independent regulatory agencies such as the NRC from mandatory compliance. *See*"Consultation and Coordination with Indian Tribal Governments," Executive Order 13, 175, 65 Fed. Reg. 67, 249 (Nov. 9, 2000) (specifically excluding "independent regulatoryagencies", as defined in 44 U.S.C 3502(5). The NRC is listed an independent regulatory agency in 44 U.S.C. 3502(5).

(10) The Petitioners provide no information relevant to the LRA and the ISL operationin Crawford, Nebraska to support this assertion. This text is identical to text taken from the North Trend license amendment proceeding.

(11) Staff addresses in contentions related to foreign ownership.

(12) Staff addresses in contentions related to foreign ownership.

(13) Petitioners have not provided support or identify how the issue is material to NRC decision. LRA discusses in Section 9 economic benefits. Unless Petitioners can provide a basis or additional information as to why additional discussion as described by Petitioners is material to NRC decision, the argument should be igonerd.

(14) Petitioners have not provided sufficient support for this claim.

(15) Staff addressed in contention related to prehistoric Indian Camp.

B. Discussion of the Petitioners' Contentions

In the event that the Board determines that Petitioners have standing to intervene in these proceedings, the Staff offers the following responses to their contentions. In the discussion below, the Staff responds to each general contention followed by each corresponding bases in the manner presented by the Petitioners.

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

Petitioners assert broad claims of deficiencies in the LRA and potential groundwater contamination at the facility, but fail to state a basis or identify the portions of the application that they dispute. 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). The fails to conform to the rules of contention admissibility under Sections 2.309(f)(1)(ii)-(vi), and should be rejected.

Contention B: CBR's proposed mining operations will use and contaminate water resources, resulting in harm to public health and safety, through mixing of contaminated groundwater in the mined aquifer with water in surrounding aquifers and drainage of contaminated water into the White River.[13]

In support of Contention B, Petitioners allege two bases: 1) that the LRA fails to disclose results of baseline preoperational sampling, and 2) that the LRA fails to compare existing data with pre-operational levels. Petition at 21. Petitioners, however, are incorrect. Regarding the first basis, they fail to raise a genuine dispute on a material issue of fact or law because LRA Section 5.8.8.3 at page 5-113 discusses preoperational baseline sampling for surface water and surface water quality. The accompanying data is found in Tables 5.8-14 and 5.8-15 at page Thus, the basis asserted cannot support Contention B.

Likewise, the second basis cannot support an admissible contention for several reasons. First, the basis is vague, overly broad and does not explain the meaning of "preoperational

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[13] Contention B contains similarities to Contention A.

levels", which does not conform to the requirements under Section 2.309(f) (1) (vi). Second, Petitioners fail to identify a requirement under Part 40 or Part 51 that the Applicant "compare existing data with preoperational levels", which does not conform to the contention admissibility requirements. Petition at 22. Third, the report relied on by Petitioners, a 1982 baseline report titled "Baseline Hydrogeochemical Investigation in a Part of Northwest Nebraska" dated June 1, 1982 ("1982 report") does not contradict the statements by the Applicant or provide any analysis of the data contained in the LRA.[14] *See* 1982 report at 1. It discusses water quality baseline for wells located throughout a twelve township area of Northwest Nebraska. Further, Petitioners fail to explain the relevance of the 1982 report to the basis and the contention asserted. The LRA, however, discusses preoperational baseline groundwater sampling and restoration information for each mine unit and private well sampling information from 1991-2007 in LRA Sections 2.7.3 at 2-166 and at 5-107 (private well monitoring results from 1991-2007), as required under Part 40, Appendix A.

Additionally, the Board should ignore the highlighted section of the 1982 report on page 24 of the Petition which reads that "[t]herefore in slightly oxidizing environments such as those reported in the upper Chadron and lower Brule…". Because Petitioners fail to explain its relevance to the basis and the contention asserted or how it challenges the information in the LRA.

Petitioners claim that "mining operations will use and contaminate water resources, resulting in harm to public health and safety" and "mixing of contaminated groundwater in the

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[14] The Board should note that the 1982 report cited by Petitioners is not part of the license renewal application. According to the title page of the report, it was prepared for the Nebraska Department of Environmental Control in June 1982 by the Conservation and Survey Division Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln by Roy Spalding. The regulations do not require that the Applicant submit such a report in the license renewal application.

mined aquifer with water in the surrounding aquifers and drainage of contaminated water into the White River". Petition at 21. Petitioners, however, fail to identify a basis in fact for this contention, expert opinion or supporting documentation.

Finally, Petitioners' claim that "[n]ow, in 2007, there are elevated concentrations of Uranium at English Creek and Squaw Creek…", Petition at 25, is neither a challenge to the adequacy of the application nor to the statements made by the Applicant. The first reference in support of that statement which is the underlined/boldfaced portion on page 25, **[d]ue to the drought conditions in this area, the streams and wetland areas have been *dry***" (emphasis added by Petitioners) does not appear to be relevant to the claim that there are elevated levels of uranium levels. The LRA contains data from 1991-2007 in Tables 3.8-14 through 5.8-15 which show uranium and radium levels have not increased over time. Petitioners' second reference to a 2007 report[15] also fails to challenge the application. The Applicant is not required to submit. *See* 2007 report discussion at page 4. Thus, citing to a monitoring report without explaining how it challenges the information in the LRA does not conform to the requirements under Section 2.309(f) (1) (v). For the reasons stated, none of the bases asserted support the admissibility of Contention B.

Contention C: Failure of CBR to consider Climate Change. See, references above concerning Climate Change. LRA fails to analyse Climate Change in the following sections:
2.5.3 (in relevant part)
Tornadoes are rare. In the USNRC, "Draft Generic Environmental Impact Statement on Uranium Milling"….A tornado in intensity Category I has a rotational speed of 134 meters per second (m/s) and a translational speed of 26 mis.

As an initial matter, the Contention should be rejected because Petitioners fail to

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[15] The report cited in the Petition is actually titled "Semiannual Radiological Effluent and Environmental Monitoring Report for Third and Fourth Quarters 2007 for Crow Butte Resources, Inc." ("2007 Report") not first and second quarters as Petitioners state. Additionally, the cited report is not part of the LRA and is a requirement of the Applicant's existing license.

specifically identify the references concerning climate change on which they rely. The Commission has stated that "a petitioner must "provide analysis and supporting evidence as to why … particular sections of [a document] provide the basis for the contention. *See Policy on Conduct of Adjudicatory Proceedings; Policy Statement*, CLI-98-12, 48 NRC 18, 22 (1998). Failure to comply with the requirements is grounds for dismissal of a contention. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). While the Petition explicitly identifies several documents on page 6 and 7 of the Petition that appear to address issues of climate change, the contention is unclear as to whether other cited documents could potentially be applicable. These general references do not conform to the requirements of contention admissibility under Section 2.309(f) (1) (v), and, therefore, the contention should be rejected. In any event, the contention is outside the scope of this proceeding because climate change analysis is not required in the LRA under 10 C.F.R. Part 40 or Part 51, and Petitioners have not identified an NRC regulatory requirement to the contrary.

Regarding Petitioners' statement that "CBR is using old data and such data concerning the weather and tornadoes needs to be updated in light of known factors related to Climate Change" also fails to challenge the adequacy of the meteorological information contained in the LRA because climate change analysis is not a requirement. Because Petitioners fail to put forth information to contradict the Applicant's meteorological information, or cite a regulatory requirement to support the Contention, it should be rejected[16].

Contention D: Changing geo-chemistry of the water is equivalent to adulteration of the water. It takes many generations for the adulterated water to recover so that it can once again be used for traditional medicines and ceremonies, and before it can be healthy again for drinking and irrigation. This causes environmental and cultural impacts, lack of environmental

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[16] While the contention asserted by Petitioners is immaterial to the Staff's decision, the Staff determined additional information regarding meteorological information may be required.

justice, depletion of the aquifer at a time of drought and economic detriments to property owners as a result of the lowering of the water table.

In support of Contention D, Petitioners cite affidavits that describe the spiritual nature of water and an article describing the same. However, they fail to cite the specific portions of the LRA in question—a requirement under Section 2.309(f)(1)(vi) and fail to identify information that sufficiently contradicts the statements of the Applicant or the technical information in the LRA regarding water quality and restoration activities. Additionally, issues challenging the "geo-chemistry" of the water and restoration activities require the opinions of an expert with technical expertise on such matters. The Affidavits of Beatrice Long Visitor, Loretta Cook, Joe American Horse, Sr. and Thomas Cook fail to demonstrate qualifications sufficient to address technical or environmental analysis related to the geochemical chemistry and the adulteration of water.

Additionally, Petitioners fail to cite specific portions of the environmental analysis that address environmental and cultural impacts of the ISL operation at Crawford. They also fail to present information to contradict the statements regarding environmental and cultural impacts by the Applicant in the LRA which are addressed in LRA Section 7.0 at 7-1. Finally, the assertion that the ISL operation "…causes a lack of environmental justice, depletion of the aquifer at a time of drought and economic detriments to property owners as a result of the lowering of the water table" is not a challenge to the adequacy of the LRA. Petitioners' beliefs and comments about the LRA or the ISL operation cannot support admissibility of a contention. Because the contention fails to raise a genuine dispute on a material issue of fact or law, it should be rejected.

Contention E: Cost-Benefits as discussed in the LRA Fail to Include Economic Value of Environmental Benefits.

Petitioners raise several bases in support of the contention but fail to provide supporting documentation or expert opinion to challenge the adequacy of the LRA. First, Petitioners cite an online news article titled "High cost of losing our wetlands" but fail to explain how the article

challenges or contradicts the LRA[17]. Further, the online article discusses a study performed on wetlands in the country of Australia by the University of Adelaide, an Australian university, which is immaterial in this license renewal proceeding. The Commission has stated that "providing any material or document as a basis for a contention, without setting forth an explanation of its significance, is inadequate to support the admission of the contention". *See* Fansteel, CLI-03-13, 58 NRC at 205. Therefore, the article should be ignored. Section 7.5.4 at 7-17 of the LRA states that there are no identified impacts to wetlands and the Petitioners fail to cite supporting documentation or information to the contrary. Also, Petitioners' statement that "the dollar value of wetlands worldwide was estimated to be $14.9 trillion. (Source: Costanza et al. 1997) " is not a challenge to the adequacy of the LRA. *See* Petition at 28. The article from which the Petitioners cite the statement, "Economic Benefits of Wetlands", summarizes some of the important ways in which wetlands contribute to the economy, but does not present information challenging the conclusions of the Applicant in the LRA. Petition at 28. The article, "Economic Reasons for Conserving Wild Nature" should also be ignored because the Petitioners fail to explain its relevance or how it contradicts the conclusions of the Applicant.

"Failure to disclose number of years it would take to complete restoration and reclamation and decommissioning—I think at least 10-20 years---so these jobs are safe until at least then---." (Petition at 29.)

The Petitioners cite LRA Section 8.1.2, which discusses the impact to the local economy and the significant loss of total employment at the site, if the Applicant would cease uranium recovery operations and begin restoration and reclamation activities. *See* Petition at 28, 29. This section also discusses the termination of all employment after decommissioning activities

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[17] The Board should note that the Petitioners cite to the University of Adelaide study in the contention. *See* Petition at 28. The web address, however, relates to the online article that merely discusses the study, but is not the study itself.

are complete. Though unclear, Petitioners are attempting to contradict the Applicant's conclusions about the significant loss of employment. They appear to assert that all jobs will remain in place, regardless if uranium recovery operations are terminated because retoration and reclamation activities would be on-going. However, Petitioners present no support for their conclusions. Petition at 29. Additionally, their claim that the LRA fails to "disclose number of years it would take to complete restoration and reclamation" is not a challenge to the LRA, because the Applicant presents the restoration schedule in LRA Section 1.7 at Figure 1.7-1 at 1-17. Thus, the basis asserted cannot support admission of Contention E.

"NB—gives misimpression that this U is used in the US when it is in fact shipped to Canada, processed, enriched and used by Canadian power companies like Cameco's affiliate Bruce Power and/or sold on the international market free of US restrictions." (Petition at 29.)

Petitioners' statement that the Applicant "gives misimpression that this U [uranium] is used in the US when in fact is shipped to Canada, processed, enriched…" is not a challenge to the adequacy of the LRA. Issues related to the destination of source material outside of the United States are outside the scope of these proceedings. The current license renewal proceeding is for the domestic use and possession of source material under Part 40, not for export of material. Export of source material is addressed under a separate process under 10 C.F.R. Part 110. In addition, Part 40 licensees are prohibited from exporting source material outside the United States unless they comply with Part 110 requirements. *See* 10 C.F.R. § 40.51(b) (6). Therefore, the contention is inadmissible.

"NB- Failure to disclose that due to foreign ownership and under the NE Alien Property Ownership Act, the leases are voidable and, therefore, of nominal value." (Petition at 29)

The asserted basis fails to raise a genuine dispute on a material issue of law or fact. Petitioners have not identified an NRC regulation prohibiting ownership of leases by foreign owners. Additionally, lease and property issues related to Nebraska laws on alien ownership of property are also outside the scope of these proceedings and outside the jurisdiction of the

NRC. For the reasons stated, the basis asserted is not litigable, and the contention must be rejected.

"NB – failure to disclose 3 Crow and Marsland and other contemplated expansions in this LRA-" (Petition at 29.)

Petitioners fail to cite any regulatory authority that requires that the Applicant identify and discuss all potential expansions in the cost-benefit analysis of the LRA. The Commission has stated that NRC proceedings are to consider ". . . the application presented to the agency for consideration and not potential future amendments that are a matter of speculation at the time of the ongoing proceeding." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 294 (2002). According to the Federal Register Notice, the LRA addresses continued operations at the Crawford, Nebraska site.[18] The scope of a proceeding is defined by the Commission in its initial hearing notice and order referring the proceeding to the Board. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790-91 (1985). Therefore, because the basis asserted is outside the scope of this proceeding and fails to assert a genuine dispute on a material issue of fact or law, Contention E is inadmissible.

II. Technical

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

The contention should be rejected for failing to conform to the contention admissibility requirements of Section 2.309 (f) (1) (ii) – (vi). Further, this contention is identical to Contention

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[18] 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. 30,426, 30,426 (May 27, 2008).

B in the environmental section of the petition—though Petitioners do not reference it as support. Petition at 21. The Staff addressed this contention in the previous section.

Contention C: Failure of CBR to consider Climate Change. See, references above concerning Climate Change. LRS fails to analyse Climate Change in the following sections:
2.5.3 (in relevant part)
Tornadoes are rare. In the USNRC, "Draft Generic Environmental Impact Statement on Uranium Milling"….A tornado in intensity Category I has a rotational speed of 134 meters per second (m/s) and a translational speed of 26 mis.

This contention should be rejected for failing to conform to the contention admissibility requirements of Section 2.309 (f) (1) (ii) – (vi). Further, this contention is identical to Contention C in the environmental section of the petition—though Petitioners do not reference it as support. Petition at 26. The Staff addressed climate change in previous a section.

Contention D: Failure to follow statistical analysis protocol. – see Abitz opinion.

Petitioners have not stated a clear basis to support their contention nor have they explained the meaning of "statistical analysis protocol", which is vague, overly broad, and does not conform to the contention admissibility requirements under Section 2.309(f) (1) (ii). The Commission's procedures do not allow "the filing of a vague, unparticularized contention." *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999). Further, "statistical analysis protocol" is not a requirement of Part 40, Appendix A. In lieu of meeting the contention requirements, they cite a document prepared by Dr. Richard Abitz to support their claim ("Abitz opinion"). To the extent that Petitioners may rely on portions of the document that are not clearly identified in support of this contention and that may be identified at some future date, the Staff reserves the right to respond. In this regard, the Staff reviewed the document to determine whether it supports a contention.

A close examination of the Abitz opinion reveals that part of the opinion offers an analysis on statistical methods used for calculating baseline water quality, but does not specify whether the Applicant failed to provide information as required under Part 40, Appendix A. For

example, Dr. Abitz focuses on Figure 2.9-2 of the LRA, but the figure is of the original research and development (R&D) wellfields that eventually became part of Mine Unit 1 and Mine Unit 2. Mine Unit 1 is restored and restoration was approved by the Staff on February 12, 2003. *See* ADAMS No. ML030440055. Mine Unit 2 is undergoing restoration and the restoration values were approved prior to the last license renewal. *See* ADAMS No. 9202110420. Dr. Abitz further contends the LRA must include baseline data for the mine units for independent review, but fails to acknowledge that Part 40, Appendix does not require such information in the LRA. The Applicant's performance-based license conditions allow it to establish a Safety and Environmental Review Panel (SERP) that can approve certain changes, tests, and procedures--- without a license amendment. *See* License Amendment No. 23 (ADAMS No. ML080950175) SERP reports are examined by the Staff during inspections.

Regarding Dr. Abitz's opinion that the baseline analyses are biased high is not a contradiction of the LRA because the Abitz opinion fails to identify any flaws in the Applicant's current practices. The Applicant establishes restoration criteria from monitoring data collected from the ore body or the mining zone that gets restored.

Dr. Abitz also challenges the Applicant's manner of calculating upper control limits and the parameters analyzed for detecting excursions. However, Dr. Abitz provides no information that the current system for calculating upper control limits is flawed nor does the opinion consider that the Applicant calculates upper control limits for each individual monitoring well, according to NDEQ regulations[19]. Because the opinion fails to challenge the adequacy of the

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[19] The Abitz opinion contains additional analyses of the LRA that appear to be unrelated to the contention. At any rate, the Staff examined the document, but determined that it failed to raise a genuine issue of law or fact, failed to provide supporting documentation for the conclusions asserted or merely commented on the technical information in the LRA.

application or state a basis in law or fact, the contention should be rejected.

Contention E: Failure to use best available technology such as 3D computer modeling, SCADA[20] – see JR Engineering opinion. Failure to maintain back-up power in case of power outages.

With regard to the first claim that the Applicant failed "to use the best available technology such as 3D computer modeling, SCADA", there is no requirement that the Applicant use computer modeling such as SCADA and the Petitioners fail to cite any requirement to the contrary. Although they rely on a document generated by JR Engineering ("JR opinion") as support, the JR opinion fails to raise a genuine dispute on a material issue of fact or law with the Applicant's statements in the LRA. The Staff notes that the JR opinion applies the incorrect standard as it attempts to identify deficiencies in the LRA. The opinion states "[i]t is our understanding that there has been some offsite contamination as a result of mining operations at the CBR site, and there is a likelihood of further contamination of the alluvium along the White River from these mining operations". JR opinion at 1. It goes on to say that "[i]t should also be the goal to understand the nature and extent of the contaminated area, so that informed decisions can be made about any mitigation. To that end, we make the following recommendations:" JR opinion at 1. As demonstrated, the conclusions provided are based on the assumption that off-site contamination has or is occurring and does not appear to be premised on the contention admissibility standards for licensing purposes. Neither citations nor other identifying information is provided to verify the nature and accuracy of the information relied on in the JR opinion. Even if the Board were to accept it as support for an admissible contention, the JR opinion fails to identify whether the Applicant's current practices are flawed.

Regarding the failure to maintain back-up power, Part 40 does not require that in-situ

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[20] "SCADA" is an acronym for Supervisory Control and Data Acquisition.

leach uranium recovery facility maintain back-up power. If the facility experiences a power failure, uranium recovery operations discontinue. Because Petitioners fail to raise a dispute on a genuine issue of fact or law, the contention should be rejected.

Contention F: Failure to include recent research-see LaGarry opinion.

This contention is inadmissible because there is no requirement that the Applicant consider research or opinions of any particular alleged expert. Petitioners cite a July 2008 opinion of Dr. Hannan LaGarry to dispute Section 2.6 “Geology Soils and Seismology”, which describes information related to regional and local geology and seismology and the formation characteristics for the Pierre Shale, Brule Formation, Chadron Formation, and the Basal Chadron. However, the LaGarry opinion provides no discussion of the LRA or challenges the adequacy of the LRA. Further evidence of this is found in the reference section of the LaGarry opinion which is a list of articles and research consulted, which does not include the LRA. The opinion merely provides Dr. LaGarry’s general perspective of uranium mining in the area, which is insufficient to challenge the LRA. Additionally, the claim that “[w]hy is CBR referring to old data and old research when there is more recent research?” again relies on the LaGarry opinion, for which the Applicant is not required to consider under NRC regulations. Further, Petitioners note that “this criticism was raised by NDEQ in its November 8, 2007” is not a challenge to the adequacy of the LRA and is outside the scope of these proceedings because NRC has not received nor requested comments regarding the adequacy of the LRA from the Nebraska Department of Environmental Quality. Further, the Petitioners have not provided supporting documentation that the NDEQ raised concerns regarding the information in the LRA. Because the contention is outside the scope of the proceedings and fails to present a dispute on a genuine issue of fact or law, it should be rejected.

Contention G: Failure to analyze mine unit activities in correlation with excursions and radiological emissions.

The contention should be rejected because "[w]hy did radon levels spike in 2003? Table 1.7-1 says that Mine Unit 9 went into production in 2003…" neither challenges the adequacy of the LRA nor contradicts the statements made by the Applicant. Petitioners' unsupported comments about the LRA cannot serve as a basis for a contention. Furthermore, Petitioners' claim that LRA Section 5.8 "fails to show where the Air Monitoring stations are" is unsupported because the locations of the air monitoring stations can be found in Figure 5.8-5 at 5-42. Because Petitioners have not stated a genuine dispute on a material issue of law or fact, the contention should be rejected.

III. Miscellaneous

Contention A: Reasonable Consultation with Tribal leaders regarding the prehistoric Indian camp located in the area surrounding CBR's proposed North Trend Expansion Project has not occurred as required under the NEPA and the National Historic Preservation Act.

The contention is outside the scope of these proceedings for two reasons. First, the proposed amendment to the license at North Trend in Chadron, Nebraska is not part of this license renewal application proceeding. Second, license applicants are not required to comply with the National Historic Preservation Act ("NHPA").[21] As a federal agency, the NRC must comply with Section 106 of the NHPA.[22] The NHPA imposes, among other things, certain consultation requirements on federal agencies, but does not, by itself, impose any requirements on applicants for NRC licenses. Regardless of an Applicant's efforts, the Staff is required to

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[21] Section 106 of the National Historic Preservation Act requires in relevant part that [t]he head of any Federal department or independent agency having authority to license any undertaking shall, … prior to the issuance of any license, … take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under part B of this subchapter a reasonable opportunity to comment with regard to such undertaking. *See* 16 U.S.C 470f.

[22] 16 U.S.C. § 470f.

conduct the consultation process.[23] Further, Petitioners fail to raise a dispute with the Applicant on a genuine issue of law or fact related to the license renewal proceeding. Therefore, it should be rejected.

Contention C: Failure to abide trust responsibility.

This contention neither challenges the adequacy of the LRA nor provides a basis in fact or law under NRC regulations which require that the Applicant address trust responsibility. Additionally, the contention fails to conform to the contention admissibility requirements under Section 2.309 (f) (1) (ii) – (vi) and must be rejected.

Contention D: Failure to respect Winters' Rights.

This contention neither challenges the adequacy of the LRA nor provides a basis in fact or law under NRC regulations that require a discussion of Winters' Rights[24]. Thus, because it fails to genuinely dispute the LRA on the basis of NRC regulations. In any event, a contention related to the Winter's Doctrine is outside the scope of these proceedings. The Staff previously addressed a similar legal issue in LBP 08-06 that the Petitioners raise here, which was rejected

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[23] *USEC, Inc.* (American Centrifuge Plant), LBP-05-28, 62 NRC 585, 622-23 (2005). The relationship between the NEPA and the NHPA was discussed briefly by the Commission in *USEC, Inc.* (American Centrifuge Plant), 63 NRC 443 (2006). In *USEC*, the Commission found that "[a]ny contractual provision that purports to shift NHPA compliance from DOE to USEC cannot affect the NRC's statutory obligation to comply with the NHPA with respect to the licensing of the proposed action." *Id*. at 446. While the facts in USEC are different than the instant proceeding, the Commission's holding is applicable in this case.

[24] The Staff notes that Petitioners appear to be asserting rights of the Oglala Sioux Tribe under the Fort Laramie Treaties. Petitioners cannot assert such rights individually, because under the treaties, the land title of the tribe was vested in the tribe, not in individual members of the tribe. Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665 (1979) ("whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and benefit of all members") (internal citations omitted). Furthermore, in NRC proceedings, individuals cannot assert standing based upon the rights of third parties. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989). The Oglala Sioux Tribe did not submit a petition to intervene in this proceeding, and none of the petitioners have claimed or demonstrated that they are authorized to represent the tribe's interests in this proceeding.

by the Board. *See* LBP 08-06 at 27, 28. Previous Commission decisions have held that neither the NRC nor the Board has the authority to decide water rights, particularly where such rights have not been clearly determined. *Arizona Public Service Co. et al.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1990-91 (1982). Additionally, the contention fails to conform to the contention admissibility requirements under Section 2.309 (f) (1) (ii) – (vi) and must be rejected.

Contention E: Failure to respect Treaty Rights.

This contention neither challenges the adequacy of the LRA nor provides a basis in fact or law under NRC regulations that require that the Applicant address treaty rights. Thus, it fails to raise a dispute with the Applicant on a genuine issue of law or facts. In any event, a contention related to treaty rights is outside the scope of these proceedings. The Staff previously addressed a similar legal issue in LBP 08-06 that the Petitioners raise here, which was rejected by the Board. *See* LBP 08-06 at 27, 28. Previous Commission decisions have held that neither the NRC nor the Board has the authority to decide treaty rights, particularly where such rights are uncertain. *See* Hydro Resources, Inc. (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC 417, 420 (2006). Additionally, the contention fails to conform to the contention admissibility requirements under Section 2.309 (f) (1) (ii) – (vi) and must be rejected.

Contention F: Failure to respect Hunting and Fishing Rights

This contention neither challenges the adequacy of the LRA nor provides a basis in fact or law under NRC regulations that require that the license renewal application address hunting and fishing rights. Thus, it fails to raise a dispute with the Applicant regarding a genuine issue of law or facts. In any event, the contention is outside the scope of these proceedings. Although members of an Indian Tribe have hunting and fishing rights, those rights are

exclusively within their reservation lands. *See, e.g.* Menominee Tribe v. United States, 391 U.S. 404, 406 (1968)[25]. According to the LRA, the ISL operation in Crawford, Nebraska is located on privately leased property and is not within the Oglala Sioux Indian Reservation at Pine Ridge, South Dakota. Therefore, the matter is immaterial to the Staff's review. The Staff previously addressed a similar legal issue that Petitioners raise here, which was rejected by the Board. *See* LBP 08-06 at 27, 28; *See discussion* NRC Staff's Reply to Petitioners' Memorandum of Law Regarding Indigenous Rights, Treaties, and Federal Indian Law filed March 3, 2008 at 6. ADAMS No. ML Previous Commission decisions have held that neither the NRC nor the Board has the authority to decide such rights. *See* Arizona Public Service Co. et al. (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-82-117A, 16 NRC 1964, 1990-91 (1982). Additionally, the contention fails to conform to the contention admissibility requirements under Section 2.309 (f) (1) (ii) – (vi) and must be rejected.

Contention G: Failure to disclose in violation of 40.9. There are several instances of intentional, reckless or negligent failures to disclose, including:

(1) Concealment of Foreign Ownership, as described herein.
(2) Suppression of Geologic Data- Whistleblower Letter/LaGarry, as opinion described herein.
(3) Failure to adequately disclose the flow of the White River towards Pine Ridge Indian Reservation

(1) Petitioners' claim related to concealment of foreign ownership is outside the scope of these proceedings. Neither Section 61 of the Atomic Energy Act of 1954 nor 10 C.F.R. Part 40 require that the Applicant disclose foreign ownership of its U.S. corporate owners. Thus, the

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[25] With regard to any claims to hunting or fishing rights outside of the reservation, the Sioux's hunting and fishing rights were clearly abrogated when Congress enacted a statute that ratified an agreement in which the Sioux "relinquish[ed] and cede[d] all the territory lying outside the [Great Sioux] reservation…including all privileges of hunting". Act of February 28, 1877, 19 Stat. 254, 255 (1877) ("Act"). By implication, fishing rights would have been extinguished by the Act. Petitioners, however, have not sufficiently demonstrated that the Sioux retained their fishing rights through any treaty. In any event, it is not within the purview of the Staff or the Board to make that determination.

basis for this contention should be rejected.

(2) Petitioners claim that the Applicant fails to disclose geologic data. They rely on the LaGarry opinion which contains a one-paragraph discussion of a Letter from John Petersen to Mr. Gary Konwinski dated April 4, 1989. *See* ADAMS Accession No. 8907120119 (as found in LEGACY or NRC Public Document Room). Mr. Konwinski was the allegations officer for the NRC Region IV at the time. In LaGarry's opinion, he speculates about the meaning of Mr. Petersen's statements regarding the suppression of information related to the existence of faults in the area. But, he fails to contradict the Applicant's statements or identify any deficiencies in the current LRA. Moreover, there is no discussion of the NRC's written analysis and response to Mr. Petersen dated June 23, 1989. *See* ADAMS Accession No. ML080740162. According to the Staff's response, Mr. Petersen's allegations were taken seriously, however, the Staff was able to resolve the issues to their satisfaction. Further evidence of the Staff's satisfaction regarding the technical data submitted for the ISL operation at Crawford, Nebraska is found in the Safety Evaluation Report, Environmental Assessment and Final Finding of No Significant Hazards later issued in December 1989.

The Commission has stated with regard to allegations raising poor licensee character and integrity that "[l]icense amendment proceedings are not a forum 'only to litigate historical allegations' or past events with no direct bearing on the challenged licensing action. *See* Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 36 n.22 (1993). Petitioners attempt to tie this letter and LaGarry's speculation regarding the letter to the current proceeding has no direct bearing on these licensing proceedings. The information presented by the Petitioners does not contain an independent claim and corroborating information of the Applicant's intent to deceive the Staff that is related to the current license renewal. Therefore, the contention raised is not a credible dispute on a genuine issue of law or fact, and must be rejected. To the extent that Petitioners are attempting to use Section 40.9 as

a requirement that the letter be submitted as part of the LRA, the claim should be rejected

(3) Finally, Petitioners' claim that the LRA fails to disclose the flow of the White River towards the Pine Ridge Reservation…" neither challenges the adequacy of the LRA nor contradicts the Applicant's statements. Petition at 32. They cite LRA Section 2.7.1.1 which discusses the flow of the White River into a northeasterly direction across Dawes County into South Dakota, which is where the Pine Ridge Reservation is located. However, the Petitioners provide no supporting documentation or expert opinion that the LRA should specifically discuss impacts at the Pine Ridge Reservation. Additionally, their claim that "as a result, contaminants that flow in the White River or along may result in contamination downstream at Pine Ridge Reservation" is equally flawed because it does not claim a deficiency in the LRA or provide any supporting material or documentation. Petitioners' beliefs cannot be a basis for admission of a contention. Finally, their claim that it would violate hunting, treaty and Winters Rights is similar to the claims asserted in other sections of the Petition, which the Staff has previously addressed. For the reasons stated, the contention should be rejected.

Dispute: The Brule sands may receive inflow from the creek during periods of high low (also Climate Related/Climate change discussion needed), and Brule is related to Arikaree and may contact with drinking water supplies" (Petition at 32, 33.)

The bases asserted is insufficient to support an admissible contention. Petition at 32, 33. Although Petitioners cite LRA Section 2.7.1.1 in support of their claim, they fail to state a dispute on a genuine issue of fact or law or provide information or expert opinion to support the claim that the "Brule is related to Arikaree" in the area of the Crawford, Nebraska facility. Contrary to their claims, the LRA Section 2.7.2.3 at 2-153 demonstrates that the Arikaree aquifer does not exist at the ISL site in Crawford. Further, they fail to state what "drinking water supplies" are implicated and provide supporting material to explain the relevance of the drinking water supplies to the LRA or the ISL site in Crawford. In addition, claims related to climate change are outside the scope of this proceeding. For the reasons stated, the basis is

insufficient to support admissibility of Contention G.

Dispute: Squaw Creek flows across mining units and if there are surface spills or problems, even small excursions, they could be carried into the Squaw, into the White River, and towards the Reservation. (Petition at 33.)

Petitioners' basis is not a challenge to the LRA, because it fails to present a claim that contradicts the statements in the LRA. Additionally, the Applicant discusses the measures taken to protect surface waters in LRA Section 7.4.2.2 at 7-9. Therefore, the basis cannot support admissibility of the contention.

Dispute: the LRA fails to discuss analysis of fracturing and faulting relative to flow and conductivity discussion. (Petition at 33)

This assertion is unsupported. Petitioners fail to provide supporting documentation or expert opinion that fracturing and faulting exists at the ISL site or to raise a dispute on a genuine issue of fact or law contradicting the statements in the LRA. LRA Section 2.6.2.5 at 2-109 discusses the nonexistence of faults and geology at the site. Further evidence of pumping tests and a discussion on recent drilling is found in LRA Section 2.6.2.5. With regard to flow and conductivity, multiple aquifer tests were performed and are found in LRA Section 2.7.2.3. For the reasons stated, Petitioners' bases cannot support an admissible contention.

Dispute: why does LRA refer to CSA, which is very old? Also, what is support for conclusion that the geochemical groundwater characteristics indicate that the two zones are not connected –and what about fractures. (Petition at 33)

This assertion is not a challenge to the LRA because these statements fail to raise a dispute on a genuine issue of fact or law that contradicts the Applicant's statements. Petition at 34. Petitioners' beliefs or comments cannot form the basis for a contention. In addition, they fail to identify supporting material or expert opinion that challenges the CSA or "commercial study area". Further, "fractures and faults" are addressed by the Staff in previous sections of the response. For the reasons stated, the basis asserted should be rejected.

Dispute: LRA 2.6, 2.7 fails to disclose the different geologic characteristics of the satellite area in the North Trend Expansion. (Petition at 34)

Petitioners cite LRA Section 2.6 and 2.7 of the license renewal application to support the claim that the application fails to disclose the different geologic characteristics of the satellite area in North Trend. However, the petitioners fail to cite any specific requirement that the LRA include information about North Trend in this application. The North Trend expansion is not part of this license renewal application proceeding and is under review by the Staff. Therefore, because they fail to raise a dispute on a genuine issue of fact or law, the basis asserted cannot support an admissible contention.

Dispute: LRA fails to disclose the test results? Fails to disclose against what standards are they measured to assess the integrity of the confining layer. (Petition at 34.)

This assertion is incorrect. Contrary to Petitioners' claims, the aquifer test results are found in Section 2.7.2.3 beginning on page 2-158. A discussion of the integrity of the confining layer is also located in the same section. Thus, because the basis fails to dispute a genuine issue of fact or law, the basis cannot support admissibility of a contention.

Dispute: Without doing ecological monitoring what is the support to say that 'these have remained relatively unchanged' from 1983 to 2007 – despite Climate Change? Also a failure to discuss climate change. Petition at 34.

The basis asserted is outside the scope of these proceedings. Contentions related to climate change were previously asserted to support Contention B, and the staff will not repeat its response in this section. Further, the LRA provides updated ecological information in LRA Section 2.8 at 2-180. For the reasons stated, the basis cannot support an admissible contention.

Dispute: Failure to disclose the results of these tests? And where is comparison between 1982 results and recent tests? (Petition at 35.)

This assertion is not a challenge to the adequacy of the LRA. The results are found in Tables 2.9-10 and 2.9-11 at 2-251. Additionally, their claim "[a]nd where is comparison between

the 1982 results and recent tests" fails to state a dispute on a genuine issue of fact or law or identify supporting documentation or expert opinion that the LRA should provide such a discussion. For the reasons stated, the basis cannot support an admissible contention.

Contention H: Failure to update in violation of Part 40, App. A; 51.45. There are many examples of failure to update to current information in the LRA:

In support of the contention, Petitioners claim "CBR's failure to update the information to 2007" does not meet the contention admissibility requirements under Section 2.309(ii) because it fails to specify the information in section 2.2 that is in dispute. LRA Section 2.2 provides information concerning the use of adjacent lands and waters of the commercial study area. However, Petitioners' claim is unsupported because information updated to 2007 is found throughout LRA Section 2.2 through 2.28 beginning at page 2-9. For the reasons stated, the contention is inadmissible.

Contention I: Failure to include recent research; use of obsolete data and information in violation of AEA 182 or 184.

This contention appears to be similar to the previous contentions to which the Staff will not repeat its response. In addition, Petitioners' broad claims of deficiencies in the license renewal application fail to conform to the rules of contention admissibility under Sections 2.309(f)(1)(ii)-(vi) and must be rejected. The citation to Section 182 of the AEA, though applicable, is inconsequential because it merely states the general legal requirements of license applications. Section 184 is inapplicable to this LRA because it states the requirements for transfer of licenses. The Staff has not received a request to transfer the license at this time.

Contention J: Missing pages – incomplete- violation of 40.9.

This contention is not a challenge to the adequacy of the LRA. The Staff conducted a search of the LRA to determine the validity of the claim and discovered the omission of page 3-22 in the ADAMS file. Apparently, the missing page was not properly scanned into the system. The Staff regrets the error and inconvenience to all of the participants and has attached the

missing page to this response.

Contention K: Lack of Authority to Issue License to US Corporation which is 100% owned, controlled and dominated by foreign interests; voidability of mineral and real estate leases due to Nebraska Alien Ownership Act.

In support of Contention K, Petitioners assert that the "LRA omits to state that the Board is appointed by a sole shareholder corporation which itself is a wholly owned subsidiary of Cameco". Petition at 36, 37. However, the Petitioners fail to raise a genuine issue of fact or law and fail to identify information or documentation to support their claim. In addition, there is no prohibition in Section 61 of the Atomic Energy Act of 1954 on Source Material or in Part 40 source material licensing proceedings[26] against foreign ownership or that requires that an Applicant for a Part 40 Source material license identify that information in the LRA. In addition, the Applicant provides information regarding its corporate structure and organization in Section 5.1, as noted by Petitioners', which demonstrates the current corporate organizational and management structure relative to the ISL site at Crawford, Nebraska. Finally, Petitioners' application of Section 40.38 is misplaced because that provision applies exclusively to uranium enrichment facilities[27]. Unless the Petitioners can show that the information is inadequate or insufficient under NRC regulations, the contention should be rejected.

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[26] Petitioners cite a previous decision by the Atomic Safety and Licensing Board in LBP-08-06 wherein Petitioners raised a similar issue and the Board addressed whether foreign ownership rules under Section 103(d) applied. Because the Board was unclear as to its applicability in a Part 40 materials case, the Board requested additional briefs and refrained from deciding the contention in its April 29, 2008 decision. After receiving briefs on the issue, the Board determined that Section 103(d) of the AEA was not applicable. The Staff and Applicant explained that Section 103(d) was applicable to reactors and other facilities that handle special nuclear material, not an in-situ leach uranium recovery facility. The NRC Staff, however, filed a petition for interlocutory review and requested that the Commission review the admissibility of all the contentions, including the issue of foreign ownership. As of this date, the Commission has not issued a decision on the Staff's petition.

[27] *See* USEC Privatization Act: Certification and Licensing of Uranium Enrichment Facilities, 62 Fed. Reg. 6,664, 6,666 (Feb. 12, 1997).

The Board should note that on pages 43-48, Petitioners discuss foreign ownership and control issues without raising a contention. Since Contention L at pages 4l and 42 seem unlikely---it discusses surety issues---the Staff will address pages 43-48 as if Petitioners intended these as support for Contention K. The Petitioners cite a number of regulations, statutes, and make generalized statements on law, applicable and inapplicable, which has little relevance to the current licensing proceeding. In fact, it appears that Petitioners cut and paste this portion of the petition from their briefs filed in the license amendment proceeding related to the North Trend site. Due to the voluminous amount of irrelevant information, the Staff will address it very briefly to the extent possible.

Petitioners cite Section 103(d), but it is inapplicable here because this proceeding relates to Part 40 source material; an in situ leach uranium recovery facility is not a production or utilization facility as defined under Section 103(d) of the AEA. They cite general environmental policies and principles as well as cite general provisions of Chapter 61 of the AEA that applies to source material. They cite Section 50.92, which is not applicable here. Section 50.92 applies to reactors. They advocate for a Negation Plan which is a policy related to Commission guidance on Section 103(d) found in Final Standard Review Plan on Foreign Ownership, Control, or Domination, 1999 WL 872103 (Sept. 22, 1999) and is not applicable. They cite Section 40.32(d) as authority, which addresses whether the granting of a license would be inimical to common defense and security. However, Section 40.32 does not require that the LRA discuss foreign owners of the Applicant. They cite general principles of Part 40.2 and 40.9. Again, foreign ownership disclosure is not required for Part 40 source material license applications. In *In the Matter of Curators of the University of Missouri*, CLI-95-1, 41 N.R.C. 71, 165 (1995), the Commission set out a test for contention admissibility holding that "unless the specific 'common defense and security' risk asserted by intervenors in this proceeding is reasonably related to, and would arise as a direct result of, the specific license

amendments that the University asks the Commission to approve," intervenors in that case were not entitled to litigate the area of concern raised by the assertions.[28] In this instance, the only risk the Petitioners discuss is that natural uranium may end up in foreign hands. However, their claims ignore the current information in the LRA regarding the corporate organizational structure of the US company including names of officers, prescribed duties and responsibilities regarding who handles NRC regulated material within the corporate structure and is responsible for compliance. Unless they can provide supporting documentation regarding how that information is inadequate or inaccurate under NRC rules, the contention must be rejected. Petitioners' beliefs cannot support an admissible contention. Because they fail to raise a dispute on a genuine issue of fact or law, the contention should be rejected.

With regard to voidability of mineral and real estate leases due to Nebraska Alien Ownership Act, there are no NRC regulations prohibiting ownership of leases by foreign owners and the contention is outside the scope of these proceedings. Additionally, lease and property issues related to Nebraska laws on alien ownership of property are also outside the scope of these proceedings and outside the jurisdiction of the NRC. For the reasons stated, the basis asserted is not a litigable claim, and the contention must be rejected.

Contention L: Calculation of Surety Bond Fails to Consider Reasonably Foreseeable Costs of Restoration and Decommissioning.

In support of the contention, Petitioners' claim that "the bond calculation fails to consider post-restoration, post-decommissioning monitoring or related monitoring". Petition at 41. As

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[28] The Commission affirmed the decision of the presiding officer who found that the project did not violate the general provisions of either section 57 of the AEA or section 70.31(d) of the Commission's regulations, each of which prohibits issuance of NRC licenses that would be inimical to the common defense and security. *Id.* at 164. The presiding officer rejected the assertion on the grounds of relevance because interveners did not point to any violation of a treaty, law, regulation or Commission guidance, a determination the Commission agreed with in part. *Id*. at 164, 165. Section 70.31, which applies to special nuclear material, is similar to section 40.32(d) for source materials licenses.

authority, they state that "Cameco's subsidiary, Power Resources, Inc. was just required to increase its bond substantially by the WY DEQ based on a similar theory". However, they fail to cite a regulatory requirement under NRC rules or supporting documentation challenging the adequacy of the information contained in the LRA according to NRC rules.[29] Because Petitioners fail to raise a dispute on a genuine issue of fact or law with the Applicant, the contention should be rejected.[30]

Contention F: Foreign Ownership of US Uranium Mines is Inimical to US Common Defense and Security and to Public Health and Safety.

The Staff addressed the issues raised regarding foreign ownership and inimicality in Contention K. To the extent that Petitioners are asserting that the LRA is inadequate under Section 40.9, there is no provision that requires that the Applicant report its foreign owners in the LRA. Therefore, the allegation of "intentional failures to disclose information concerning foreign ownership, control and domination" cannot support a claim under Section 40.9. Petition at 49, 51. Assertions related to the Nebraska Alien Ownership Act are immaterial in this licensing proceeding and the Staff addressed that Act in previous sections of the response. Petition at 52, 53. As the Petitioners themselves point out on page 54, the NRC has known of the Applicant's prior foreign ownership and this is not the first time the issue of foreign ownership has been raised in connection with this facility. In a letter dated August 1989, the NRC responded to the question of the Applicant's foreign ownership from a member of the public, concluding that alien ownership and overseas shipment of mined uranium under Section 40.32(d) and other sections under Part 40 were not subjects considered. See ADAMS No.

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[29] The Robinson opinion cited an issue related to restoration and surety but Petitioners did not cite it in support of this contention. *See* Robinson opinion at 10, paragraph D.

[30] Additional information on page 43 through page 49 is not related to Contention L.

ML080390125. The license was later issued. Thus, the discussion of the Applicant's prior ownership relative to the initial proceeding in 1989 is irrelevant not a challenge to the current LRA.

Issues related to the revocation of a license is not within the purview of the Board because the Board is limited to considering the LRA. Petition at 59. Revocation of a license is an enforcement proceeding more appropriately addressed by the Staff under Section 2.209, which they are free to pursue. Because none of the arguments presented challenge the adequacy of the LRA under current NRC rules, the contention should be rejected.

V. Staff's Opposition to Petitioners' Request for Subpart G Proceedings.

The Staff opposes Petitioners' request pursuant to section 2.310(d) that Subpart G hearing procedures be applied in this proceeding. *See, e.g.*, Cook Petition at 4. Petitioners' reliance on section 2.310(d) is misplaced because this section specifically applies only to "nuclear power reactors;" not licenses issued under Part 40. 10 C.F.R. § 2.310(d) ("In proceedings for the grant, renewal, licensee-initiated amendment, or termination of licenses or permits for *nuclear power reactors* . . .") (emphasis added). Licensee-initiated amendments under Part 40, such as the amendment at issue in this proceeding, "may be conducted under the procedures of subpart L of this part." 10 C.F.R. § 2.310(a). Further, section 2.1200 provides that the provisions of Subpart L govern all but a select few proceedings. In adopting section 2.310, the Commission stated that unless one of the applications specified in paragraphs (b) through (h) apply, "the listed proceedings *are to be conducted under Subpart L*." Final Rule: Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,206 (January 14, 2004) (emphasis added). Consequently, because none of the applications specified in paragraphs (b) through (h) apply in this proceeding, the appropriate hearing procedure is Subpart L.

Furthermore, the Commission strongly favors Subpart L and has stated that Subpart G is best used to resolve issues where "motive, intent, or credibility are at issue, or if there is a

dispute over the occurrence of a past event" because "the central feature of a Subpart G proceeding is an oral hearing where the decisionmaker has an opportunity to directly observe the demeanor of witnesses in response to appropriate cross-examination…" *Id*., at 2, 205. Therefore, under the foregoing principle, Petitioner's request fails because there are no litigable claims of credibility or disputes over past events.

1. True Beneficial Ownership and Nature of Crow Butte Mine Was Intentionally Concealed From Regulators

Neither the basis nor the contention on foreign ownership is credible because the Applicant is not required to discuss foreign ownership under the AEA or Part 40. This was the case in 1989, prior to the Staff's decision to grant a Part 40 license to the Applicant. Thus, Petitioners request for Subpart G is not justified nor justifies use of Subpart G procedures.

2. Applicant CBR Has Suppressed Geologic Data and Designed Monitoring to Avoid Detection of Suspected Groundwater Contamination for the Purpose of Concealing Knowledge of the Same Faults and Fractures Alleged by Petitioners to Exist.

Neither the basis nor the contention is credible. As the Staff explained in the response to Contention G, Paragraph 2, the issues identified by Petitioners were previously resolved. Because Petitioners are unable to produce independent, credible evidence to support their claim as it relates to the current LRA, Subpart G is not warranted. To date the Staff has not received information that aquifers are contaminated as a result of the operation, that the current detection systems are flawed, or that the Applicant is intentionally withholding geologic or monitoring information.

3. Applicant has Misrepresented the Nature of Consultation Regarding Mineral and Water Resources in Conflict with Testimony of Material Witnesses.

The basis appears to be identical to text in the North Trend petition and reflects events that occurred in relation to that license amendment proceeding and should be ignored. *See* Petitioners. *See* Petitioners' Brief on Contention E and Subpart G at 61 (ADAMS No.

ML081570141). Further, as asserted by the Staff, Petitioners' Contention A is inadmissible. Petition at 31.

In sum, none of the arguments asserted in support of Subpart G procedures are amenable to litigation in this proceeding. Petitioners have not demonstrated how Subpart L procedures are inadequate to ascertain relevant information to the proffered contentions.

CONCLUSION

For the reasons set forth above, the petitions for hearing filed by Petitioners (a) fail to comply with standing requirements set forth in 10 C.F.R. §2.309(d), and (b) fail to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, Petitioners' alternate request for discretionary intervention should also be denied because the petition fails to meet the requirements under Section 2.309(e). Similarly, the request for a hearing pursuant to subpart G should be denied.

Respectfully Submitted,

Executed in Accord with 10 CFR 2.304(d)
Andrea' Z. Jones
Brett Michael Patrick Klukan
Counsel for NRC Staff

Signed in Rockville, MD
This 25th day of August, 2008.

August 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket Nos. 40-8943
	)	
(License Renewal for the In Situ Leach	)	
Facility, Crawford, Nebraska)	)	ASLBP No. 08-867-08-OlA-BD01

NRC STAFF'S RESPONSE IN OPPOSITION TO PETITONER'S REQUEST FOR HEARING AND/OR TO INTERVENE OF THE OGLALA SIOUX TRIBE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the NRC Staff (hereinafter "Staff") files this response to the above-listed petition for hearing (hereinafter "Petition") filed on July 28, 2008. For reasons explained hereafter, the Staff submits that the Petition should be denied for failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d). Additionally, the Staff respectfully submits that the Board should deny, for failure to comply with the admissibility standards of 10 C.F.R. § 2.309(f)(1), all of the proffered contentions. Additionally, the Staff respectfully submits that the Petitioner's request for discretionary intervention pursuant to 10 C.F.R. § 2.309(e) should be denied for failing to meet the requirements thereof.

BACKGROUND

Crow Butte Resources, Inc. (hereinafter "CBR" or "Applicant') is licensed to operate an in-situ leach (hereinafter "ISL") recovery facility in Crawford, Dawes County, Nebraska.[4] On November 27, 2007, CBR sent by letter to the NRC a license amendment application

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[4] CBR possesses a source material license, SUA-1534.

(hereinafter "Application") (ADAMS ML073480266 & ML073480267), requesting renewal of its source materials license for the standard 10-year period. In a letter to CBR dated March 28, 2008, the NRC Staff stated that it had found, per its administrative review, the Application acceptable to begin a technical review.[5] On May 27, 2008, a notice of opportunity to request a hearing or petition to intervene was published in the Federal Register, with a deadline for filing such on July 28, 2008.[6] On the date of the deadline for filing, the NRC received the subject petition from the Oglala Sioux Tribe (hereinafter "Petitioner") to which the NRC Staff herein responds. The NRC Staff was served with the petition on July 31, 2008.

DISCUSSION

I. Standing

A. Treaty Issues and Trust Relationship between the United States and the Oglala Sioux

Referencing several treaties between the Sioux Nation and the United States in conjunction with the "federally recognized tribe" status of the Oglala Sioux,[7] Petitioner asserts that the "Oglala Sioux Tribe has a trust relationship with the United States government, including all its agencies,"[8] and, as such, Petitioner contends that "[a]s a trustee for the Tribe, the NRC has an affirmative duty to ensure that action it takes, including grant a renewal license, will not negatively impact the Tribe."[9] As the Petitioner invokes this "trust relationship" in

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[5] Letter from William von Till to Stephen P. Collings (dated March 28, 2008) (ML080720341).

[6] Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, 73 Fed. Reg. 30,426 (May 27, 2008).

[7] Petition at 2-5.

[8] *Id.* at 5.

[9] *Id.* at 6.

connection to both standing and the admissibility of its proffered contentions,[10] NRC Staff considers it appropriate to discuss the nature of this "trust relationship" and its potential effect on the Petitioner's pleading at the outset of NRC Staff's response. The NRC Staff begins this discussion with a review of the treaties referenced by the Petitioner.

The Fort Laramie Treaty of 1851 (hereinafter "1851 Treaty") was a treaty between several Indian tribes, including the Sioux, and the United States.[11] Pursuant to Article 5 of the 1851 Treaty, the Sioux territory included land in northwestern Nebraska, north of the North Platte River.[12] The 1851 Treaty recognized the title[13] of each of the participating tribes to the lands described in the treaty.[14] The Supreme Court has acknowledged that the 1851 Treaty "recognized as Sioux territory" all of present-day South Dakota and parts of present-day

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[10] *Id.* at 6, 9, 13, 17, 20.

[11] 11 Stat. 749 (1851); Kappler, 2 Ind. Aff. L. & Treaties, 594 (1904) (hereinafter "Kappler"). According to Kappler, the Indian tribes signatories to the 1851 Treaty included "the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros Ventres Mandans and Arrickaras." Kappler at 594.

[12] Kappler at 594.

[13] "Indian title," or "aboriginal land," refers to the right of Indian tribes to occupy and use land. *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945). "Recognized title" is "Indian title" that has been recognized by the United States pursuant to a treaty, statute, or agreement. *Id.* Indian title is derived from an Indian tribe's exclusive use and occupancy of a portion of land for a significantly long period of time. *Id.* at 338-39. When the United States recognizes Indian title to a portion of land, the Federal Government, nonetheless, still retains fee title to the land. *Oneida Nation v. County of Oneida*, 414 U.S. 661, 667 (1974); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 270 (1955). Thus, recognition of Indian title to a portion of land by the United States does not alter or expand upon the tribe's right of occupation and use, or, inversely, alter or diminish the Federal government's power to extinguish the Tribe's right. *See Oneida Nation*, 414 U.S. at 670; *Northwestern Bands of Shoshone Indians*, 324 U.S. at 338-39. Recognition of Indian title is important, though, because if the Federal government does extinguish a Tribe's right to some or all of a portion of land, only land held as recognized by the United States is compensable as a takings under the Fifth Amendment to the Constitution. *Tee-Hit-Ton Indians*, 348, U.S. at 281-82.

[14] *See, e.g., Crow Tribe of Indians v. United States*, 284 F.2d 361, 367-68 (Ct. Cl. 1960).

Nebraska, Wyoming, North Dakota, and Montana.[15] However, as is important to note, the 1851 Treaty did not create reservations for the participating tribes.[16]

The Fort Laramie Treat of 1868 (hereinafter "1868 Treaty") was made between several tribes of the Sioux Nation, including the Oglala Sioux, and the United States.[17] Article 2 of the 1868 Treaty created a reservation for the "absolute and undisturbed use and occupation" of the Sioux.[18] The reservation was situated such that the southern boundary of the reservation was the northern border of the state of Nebraska from the Missouri River "to the one hundred and fourth degree of longitude west from Greenwich."[19] In consideration for the creation of the reservation in the 1868 Treaty, the Sioux agreed to relinquish "all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits [of the reservation], and except as hereinafter provided."[20] In Article 11 of the 1868 Treaty, the Sioux agreed to relinquish "all right to occupy permanently the territory outside [the newly created] reservation as defined [in Article 2 of the 1868 Treaty]," but, nonetheless, reserved the right "to hunt on any lands north of the North Platte River … so long as the buffalo may range thereon in such numbers as to justify the chase."[21] Pursuant to Article 16 of the 1868 Treaty, the United

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[15] *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 n. 1 (1980).

[16] *See* Kappler at 595 (in recognizing the territorial boundaries, the tribes did not "abandon or prejudice any rights or claims" to other lands, and each tribe retained "the privilege of hunting, fishing, or passing over" the territories of any of the other tribes).

[17] 15 Stat. 635, 641 (Apr. 29, 1868).

[18] *Id.* at 636; *see also Sioux Nation*, 448 U.S. at 374.

[19] 15 Stat. at 636.

[20] *Id.*

[21] *Id.* at 639.

States agreed to hold and consider as "unceded Indian territory" the "country north of the North Platte river and east of the summits of the Big Horn mountains," such that "no white person or persons" would be allowed to settle in or occupy that territory, or pass through it without the consent of the Sioux.[22] However, the lands held and considered under Article 16 to be unceded Indian territory were not treated as lands part of the reservation to which the Sioux would have the right of "absolute and undisturbed use and occupation."[23]

On February 28, 1877, the United States Congress enacted a statute that ratified a purported agreement between the Sioux Nation, to which the Oglala Sioux Tribe was a part, and the United States.[24] Pursuant to Article 1 of the statute, the northern and western boundaries of the Sioux reservation set out in Article 2 of the 1868 Treat were changed, taking some 7,000,000 acres from the Sioux, and, in addition, the Sioux were said to have agreed to relinquish and cede to the United States "all the territory outside the said reservation … including all privileges of hunting."[25]

So long as Congressional intent to do so is unambiguous, Congress has the power to abrogate Indian treaties.[26] Even if they contravene "express stipulations in an earlier treaty," Federal courts are required to uphold statutory provisions clear and explicit as to such contravention.[27] Thus, the 1877 Act, set out in clear and unambiguous language, extinguished

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[22] *Id.* at 640.

[23] *See United States v. Sioux Tribe*, 616 F.2d 485, 489 (Ct. Cl. 1980).

[24] Act of Feb. 28, 1877, 19 Stat. 254, 257 (1877).

[25] *Id.* at 255; *Sioux Nation*, 448 U.S. at 383 n.14.

[26] *Mille Lacs Band*, 526 U.S. at 202; *see also Sioux Nation*, 448 U.S. at 410-11.

[27] *United States v. Dion*, 476 U.S. 734, 738 (1986) (*quoting Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893)).
(continued. . .)

all of the Sioux Nation's rights to land, including the rights reserved under Articles 11 and 16 of the 1868 Treaty, outside of the reservation boundaries, as revised by the 1877 Act.[28] Regarding the trust relationship of the Oglala Sioux Tribe with the United States, Petitioner cites to *Seminole Nation v. United States*,[29] in which the Supreme Court recognized:

> [i]n carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility.[30]

Petitioner states that, as such, the "Oglala Sioux Tribe has a trust relationship with the United states government, including all its agencies."[31] As regards this trust relationship between the United States and its agencies and the Oglala Sioux, the NRC Staff does not disagree with the Petitioner, but the Petitioner fails to demonstrate how the trust relationship alters the application or content of NRC regulations with regard the standards for standing[32] or the admissibility of contentions[33] that are applicable in this proceeding. If the Petitioner is arguing that the foregoing standards should be altered, loosened, or exempted in light of the trust relationship, the NRC Staff submits that such is not contemplated by the Commission's regulations regarding standing in this

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(. . .continued)

[28] 19 Stat. at 255; *see also Sioux Nation*, 448 U.S. at 382-83 (stating that the effect of the 1877 Act was to abrogate the 1868 Treaty).

[29] Petition at 5 (*citing* 316 U.S. 286, 296-97 (1942)).

[30] *Seminole Nation,* 316 U.S. 286, 296-97 (1942).

[31] Petition at 5.

[32] 10 C.F.R. § 2.309(d)(1).

[33] *Id.* at § 2.309(f)(1).

proceeding.[34]

B. Legal Requirements for a Requestor / Petitioner to Demonstrate Standing

Any person or organization who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate standing to intervene in the proceeding.[35] Section 189a of the Atomic Energy Act requires that the NRC provide a hearing "upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such a proceeding."[36] The Commission has implemented the mandate of Section 189a in 10 C.F.R. § 2.309(d)(1), which provides, in relevant part, that a request for hearing or petition to intervene must state:

> (i) The name, address and telephone number of the requestor or 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.[37]

In determining whether a petitioner has established the requisite "interest" to manifest standing under the Commission's regulations, the Commission has consistently directed licensing boards to apply, as guidance, contemporary judicial concepts of standing, as stated and developed in federal court case law.[38] Judicial concepts of standing have been consistently

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[34] *See* 10 C.F.R. § 2.309(d)(1).

[35] *Id.* at § 2.309(a).

[36] 42 U.S.C. § 2239(a)(1)(A).

[37] 10 C.F.R. § 2.309(d)(1).

[38] *See e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station) CLI-98-21, 48 NRC 185, 195 (1998) ("When determining whether a petitioner has established the necessary 'interest' under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing.") (*citing Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998) *and Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)). (continued. . .)

interpreted by the Commission to mean that, in order to demonstrate standing, "a petitioner must (1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision."[39] The shorthand by which the Commission has referred to the foregoing three criteria is, respectively, "'injury in fact,' causality, and redressability."[40] "Injury in fact" must be actual or threatened,[41] but it cannot be "conjectural" or "hypothetical."[42] Nor can the threat of injury be too speculative.[43] Additionally, the "injury in fact" alleged by a petitioner must lie within the "zone of interests" protected by the statutes governing the proceeding: either the AEA or the National Environmental Policy Act of 1969 (hereinafter "NEPA") (as amended) 42 U.S.C. §§ 4321, *et seq.* (2000).[44]

A petitioner must also establish a "causal link" between the alleged "injury in fact" and the challenged action.[45] A determination that this causal link exists, that the injury alleged is fairly traceable to the challenged action does "not depend on whether the cause of the injury

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(. . .continued)

[39] *Yankee Atomic Elec. Co.*, CLI-98-21, 48 NRC at 195 (*citing Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)).

[40] *Id.*

[41] *Id.*

[42] *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (*citing O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

[43] *Id.* at 72 (*citing Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

[44] *Quivira Mining Co.*, CLI-98-11, 48 NRC at 6 ("Consistent with an additional, so-called 'prudential' requirement of standing, the Commission has also required the petitioner's interests to fall, arguably, within the 'zone of interests' protected or regulated by the governing statute(s)—here, the AEA and NEPA.").

[45] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998).

flows directly from the challenged action, but whether the chain of causation is plausible."[46] Nonetheless, the Commission has required that there be a "realistic threat … of direct injury."[47] Finally, as to the element of redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[48]

1. "Proximity Plus" Presumption of Standing

Although in nuclear power reactor construction permit and operating license proceedings, the Commission has applied a presumption that proximity within 50 miles of a plant *alone is enough* to demonstrate standing (without having to address "injury in fact," causation, and redressability),[49] the Commission has determined that, outside of those proceedings, a presumption based on geographical proximity alone is not enough to demonstrate standing.[50] Instead, in these other proceedings, such as material license proceedings, the Commission has decided to apply a "proximity plus" analysis: "[a] presumption of standing based on geographic proximity may be applied in cases … where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."[51] Whether a proposed action bears an "obvious potential for offsite consequence," and, if so, at what distance to the radioactive source can a

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[46] *Id.* at 276 (1998) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 75).

[47] *Int'l Uranium (USA) Corp*. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 74 (1994).

[48] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (internal quotation marks omitted) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[49] *See, e.g., Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

[50] *In the matter of USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005).

[51] *G.I.T.*, CLI-95-12, 42 NRC at 116 (*citing Sequoyah Fuels*, CLI-94-12, 40 NRC 64, 75 n.22).

petitioner be presumed to be affected, is determined "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."[52] The maximum distance from which a petitioner must live or work to the source of radiological material in order to invoke the "proximity plus" presumption "depends on the danger posed by the source at issue."[53]

2. "Organizational" and "Representational" Standing

In order for an organization to establish standing as a petitioner, it must show "either immediate or threatened injury to its organizational interests or to the interests of identified members."[54] An organization attempting to assert standing on its own behalf ("organizational" standing) "must demonstrate a palpable injury in fact to its organization interests that is within the zone of interests protected by the AEA or NEPA."[55] An organization attempting to assert standing on behalf of one or more of its constituent members ("representational" standing) "[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."[56]

C. Petitioner's Argument in Support of Standing

In support of standing, Petitioner states that "[t]he Oglala Sioux Tribe [] recognize[s]

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[52] *Id.*

[53] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72 n.22.

[54] *G.I.T.*, CLI-95-12, 42 NRC at 115.

[55] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque New Mexico 87120) LBP-98-9, 47 NRC 261, 271 (1998).

[56] *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI) CLI-00-14, 52 NRC 37, 47 (2000).

aboriginal territory in the area of the renewal permit," and, in addition, that "[m]any of the cultural resources in the area are associated with the Tribe."[57] Petitioner argues that the Pine Ridge Indian Reservation ("hereinafter "Reservation"), "located only 30 miles from the Crow Butte site," is affected in its use of water resources by the operation of in situ leach mining by CBR.[58] As Petitioner posits, "[t]he in situ leach mining not only depletes the aquifers used by the Tribe so that less water is available, but also negative affects the quality of the water."[59] Petitioner also argues that since the beginning of Crow Butte's mining operations, "the Tribe has experienced a loss in total available water, the water that is left is of lesser quality, and numerous negative health impacts to its people. It also impacts live stock using well water or the White River and its tributaries as their source of water."[60]

D. NRC Staff's Response to Petitioner's Argument for Standing

Failing to attempt to demonstrate how at least one of its individual members may be affected by this licensing proceeding, Petitioner, in order to demonstrate "organizational" standing, must show a palpable injury in fact to its organization interests that is within the zone of interests protected by the AEA or NEPA.[61] In order to demonstrate an "injury in fact" to its organization, the Petitioner must assert more than a "broad interest [] shared with many others [] in the preservation of the environment in the area [of the licensed area]."[62] Petitioner must

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[57] Petition at 6.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *See Hydro Resources, Inc.*, LBP-98-9, 47 NRC at 271.

[62] *See Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), 53 NRC 344, 348 (2001) (*citing Sierra Club v. Morton*, 405 U.S. 727, 34-35 (1972)).
(continued. . .)

demonstrate a "discrete institutional injury to itself, other than general environmental and policy interests of the sort [the Commission] repeatedly [has] found insufficient for organizational standing."[63] Petitioner has not done that. What Petitioner has done is offer a short series of "conjectural" or "hypothetical" statements that lack any support.[64]

Petitioner alleges, without any explanation, that the operation of the Crow Butte facility has affected the quantity and quality of its water supply, and affects negatively the health of its people and livestock. Petitioners do not specify the location(s) of wells, the aquifer in which such wells operate, or the frequency that such wells are used and for what purposes. Petitioner also fails to provide similar information with respect to its claims regarding surface water resources. These bare assertions do not constitute a "concrete and particularized" injury.

In order to show an "injury in fact," the Petitioner must also show a causal relationship between the alleged injury and the proposed licensing action.[65] Petitioner has not established a pathway or mechanism by which "contaminants" from the proposed licensed area could reach the water resources cited by the Petitioner. In absence of such showing, the Petitioner raises only "unfounded conjecture."[66]

Petitioner's citation to several treaties to which the Oglala Sioux is a signatory, with regards to the enforcement thereof, is also not sufficient to demonstrate standing. Petitioner cannot base its organization interest simply upon "compliance with the dictates of federal and

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[63] See *Int'l Uranium (USA) Corp.*, CLI-01-21, 54 NRC at 252.

[64] *See Sequoyah Fuels,* CLI-94-12, 40 NRC at 72.

[65] *See Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43-44 (1990).

[66] See *Int'l Uranium (USA) Corp.*, CLI-01-21, 54 NRC at 252-53 (*compare with Sequoyah Fuels,* CLI-94-12, 40 NRC at 72).

state laws and regulations."[67] Furthermore, there is no role for the NRC under the AEA or NEPA to adjudge or assess treaties made by the U.S. Government with Indian Tribes and Nations.[68]

In light of the foregoing, the Board should find that the Petitioner has failed to demonstrate standing in this proceeding, and, thus, the Petition should be denied.

II. Contention Admissibility

A. Legal Standards for the Admissibility of Proposed Contentions

In addition to a show of standing, a petitioner, in order to gain admission to a hearing as a party, must submit at least one contention that meets the admissibility requirements of 10 C.F.R. § 2.309(f)(1).[69] For each contention a petitioner wishes to have admitted at hearing, the petitioner 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 refereces 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.[70]

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[67] *Int'l Uranium (USA) Corp.*, LBP-01-15, 53 NRC at 348.

[68] *See Hydro Resources Inc.* (P.O. Box 777, Crownpoint, NM 87313), CLI-06-29, 64 NRC __, slip op. at 4 (2006).

[69] *See* 10 C.F.R. § 2.309(a).

[70] *Id.* at § 2.309(f)(1).
(continued. . .)

Additionally, a contention must be within the scope of the proceeding as defined by the notice of hearing in order to be admissible.[71] The contention rule is "strict by design."[72] The rule operates as a "[t]hreshold standard [] necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues."[73] As such, failure to comply with any of the foregoing elements of 10 C.F.R. § 2.309(f)(1) is grounds for a contention's dismissal.[74] Commission practice does not "permit 'notice pleading,"[75] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[76] A petitioner may not rely on mere speculation nor base allegations as support for the admission of a proffered contention.[77] If a petitioner fails to provide sufficient support for proffered contentions, it is not within the authority of a Board to construct assumptions of fact to shore up

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[71] *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4) CLI-00-23, 52 NRC 327, 329 (2000).

[72] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3) CLI-01-24, 54 NRC 349, 358 (2001).

[73] Changes to Adjudicatory Process, 69 Fed. Reg. at 2,182, 2,189-90 (Jan. 14, 2004).

[74] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Louisiana Energy Servs.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54 (2004).

[75] *N. Alt. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

[76] *Id.* (*quoting Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998)).

[77] *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

those deficiencies.[78] Similarly, a petitioner must provide sufficient explanation as to the significance thereof of materials and documents referenced in support of the contention.[79]

B. Petitioner's Reference and Reliance upon 10 C.F.R. 40.9

In support of several of its contentions, Petitioner references 10 C.F.R. § 40.9[80] as a regulatory requirement for completeness and accuracy of information in the Application with which the Applicant must comply.[81] This regulation provides in part that information provided to the Commission by an applicant for a license must be complete and accurate in all material respects. 10 C.F.R. § 40.9. The regulatory provisions related to the review of license applications are contained elsewhere in 10 C.F.R. Part 40; and, as such, 10 C.F.R. § 40.9 requirements are not among the findings the NRC must make regarding the Application. Additionally, Petitioner's reference to 10 C.F.R. § 40.9 is an attempt to contest the completeness of the Application, a challenge beyond the scope of this proceeding.[82] The Board should, in light of the foregoing, should generically disregard Petitioner's reference to 10 C.F.R. § 40.9 in support of its contentions.

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[78] *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia) LBP-95-6, 41 NRC 281, 305 (1995).

[79] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

[80] Petition at 9, 19, 22.

[81] *See id.* at 9.

[82] *See Nuclear Management Co., LLC* (Monticello Nuclear Generating Plant), 62 NRC 735, 743 (2005) ("[T]he completeness of [an application] is not a matter that this Board should, or can, decide upon a motion. The decision whether to accept [an application] for docketing is made by the NRC Staff, and that decision is not subject to review by this Board.").

C. Petitioner's Proposed Contentions

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 nonradiological impacts for possible excursions or spills are "small" (see 7.1.2.1 of application).[83]

Petitioner argues that "CBR has provided no scientific evidence to show that residents in and around the mining site and up to Pine Ridge have no significant risk to their health."[84] To demonstrate the possibility of "environmental and other effects **beyond** the confines of the mine itself,"[85] Petitioner cites to a letter sent to the NRC in 1989 by a geologist, John Peterson, showing in his expert opinion that "the mining aquifer used by CBR likely communicated with the aquifers that supply the drinking water to the residents on the Pine Ridge Indian Reservation."[86] To that same end, the Petitioner also cites to the expert opinion of Dr. Hannan LaGarry, which Petitioner reads as "showing the likelihood of spills from the mining site could reach the residents of Pine Ridge."[87] The Petitioner asserts that, in light of expert opinions to which it has referenced, demonstrating the hydraulic communication between the aquifers, "CBR must present data to show the alternatives, if any, that are available to reduce or avoid environmental and other effects beyond the confines of the mine itself."

Petitioner argues that the spill contingency plan in Section 5.8.1.3 of the Application is deficient in that it does not take into account the possibility that in between the times the

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[83] Petition at 6.

[84] *Id.* at 7.

[85] *Id.* (*emphasis in original*).

[86] *Id.*

[87] *Id.*

monitoring wells are assessed biweekly, a leak could occur and go undetected. Petitioner also claims that the ground water monitoring plain in Section 5.8.8.2 of the application is deficient because it "does not indicate that the monitoring wells are tested for uranium whether radioactive or depleted, and other heavy metals known to be toxic and linked to the development of cancer if ingested over time." Referencing an expert opinion by Dr. Richard Abitz, the Petitioner goes only to claim that "[a]s uranium is mobilized and transported by the high oxygen and alkalinkity in the lixiviant, there is no valid scientific reason to exclude it from the list of excursion monitoring parameters." As stated by Dr. Richard Abitz in his expert opinion referenced by the Petitioner:

> [u]ranium is a key indicator of lixiviant excursion because its concentration in baseline wells is generally two or three orders of magnitude lower than the lixiviant and it is highly mobile as a carbonate complex in the lixiviant. Comparing Table 2.7-15 [in the Application] with Table 3.1-3 [in the Application] shows that the lixiviant/baseline concentration ratio is 27 for chloride, 11 for conductivity, 13 for alkalinity and 13000 for uranium (the higher the lixiviant/baseline ratio, the greater the probability that an excursion will be detected at a monitoring well). As the uranium ration is approximately 100 times grater than the other parameters it will perform about 100 times better in he detection of an excursion. Therefore, there is no rational[] basis to exclude the best excursion indicator from the list of excursion parameters.[88]

The Petitioner additionally faults the Applicant for failing to identify in the Application where the lab testing of the monitoring wells is conducted and by whom. As explained by the Petitioner, "[t]he Oglala Sioux Tribe must be assured that any testing is accurate and unbiased. Given the price of uranium around $135/pound, and potential gross profits at CBR of $50 mil[lion] a year, any appearance of impropriety must be addressed."[89]

Petitioners find that in the Application "CBR has failed to produce any scientific data to

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[88] Expert Opinion of Richard J. Abitz, Ph.D., at *2 (dated July 28, 2008).

[89] Petition at 8.

substantiate their finding of 'no non radiological health effect."[90] The Application is also improperly devoid, according to the Petitioner, of a "literature review to show that CBR made an effort to find new scientific data on the non radiological impact of ISL mining on the public at large and the Oglala Sioux Tribe specifically."[91]

In support of Contention A, Petitioner cites to two studies published through the National Institute of Health regarding the health consequences of nonradiological exposure to uranium in drinking water.[92] Petitioner also cites to a study published in the American Journal of Public Health in 2005 by Deborah Rogers and Daniel Petereit regarding the higher than average cancer rates experienced by the Oglala Sioux Tribe.[93]

The Petitioner has not alleged with sufficient specificity, aside from uranium, what contaminants to which the Petitioner makes reference in Environmental Contention A, nor does Petitioner specify with particularity the affected water resources of which it speaks. The Petitioner has not presented sufficient information in support of its Contention with regard to how the water is extracted from surface and groundwater sources and consumed by the Reservation population. The Petitioner does not provide the location of any drinking water wells on the Reservation. Petitioner does not provide the depth at which any such wells operate. Petitioner likewise does not provide any information in the Petition on how surface water is consumed by the Reservation population.

The Petitioner has not presented, though, factual or expert support regarding the

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[90] *Id.*

[91] *Id.*

[92] *Id.* at 9-10.

[93] *Id.* at 11.

occurrence, characteristics, and direction of hydraulic flow between the water bodies. The simple possibility of connection between the water bodies does not suppose the particular specificities of hydraulic flow between them. Petitioner has presented no information to support the position that the hydraulic flow would be as assumed by the Petitioner in order to make its claim. Petitioner's failure to establish by factual or expert support a pathway or mechanism for the alleged contaminants to flow from the CBR mining facility to the Petitioner's referenced water resources renders Petitioner's claim unsupported and, thus, conjecture insufficient per 10 C.F.R. § 2.309(f)(1)(vii).

With regard to the deficiencies Petitioner finds in the Applicant's spill contingency plan and groundwater monitoring plan, such allegations are not relevant to and have no bearing upon the Contention as framed by the Petitioner, as described above. While Abitz argues that there is no rational reason not to include uranium as an excursion parameter, Abitz does not contest the adequacy of the excursion parameters selected by CBR. Petitioners do not reference any requirement that excursion parameter testing be by an independent laboratory or that CBR's lab testing is somewhat inadequate otherwise. Furthermore, monitoring requirements are set out in the Class III Underground Injection Control (hereinafter "UIC") permit issued by the Nebraska Department of Environmental Quality.[94] Issues of state law are matters properly of state governments and agencies, and, as such, not the province of the NRC in its licensing proceedings.[95] Thus, to the extent the Petitioner is challenging the safety sufficiency of the Nebraska issued permit, the issue is outside the scope of this proceeding.[96]

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[94] *See* Underground Injection Control Permit No. NE0122611 held by CBR (ML011230454).
[95] *Northern States Power Co.* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

[96] S*ee Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

Petitioner does not specify any statutory or regulatory requirement that would necessitate the preparation and inclusion of a literature review of the health impacts of ISL mining with the Application, nor does Petitioner indicate an alleged deficiency otherwise with the Application. Likewise, Petitioner does not specify in its lengthy discussion of potential health impacts of exposure of uranium any alleged deficiencies in the Application, nor how the information is material to any findings the NRC must make with regard to the Application.

In light of the foregoing, the Petitioner has not presented factual or expert information sufficient to support Contention A, and, as such, should be dismissed by the Board.

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.[97]

Petitioners allege that, in compliance with the National Historic Preservation Act (hereinafter "NHPA"),[98] the Oglala Sioux Tribe, as a federally recognized tribe,[99] "must be consulted with regarding any cultural resources in the area whenever there is a major federal action, i.e. the NRC granting a mining permit to the Applicant."[100] As "the Crow Butte area is within the 1851 Treaty area, which is recognized as the aboriginal land of the [Oglala Sioux] Tribe," Petitioner states, "the Tribe ascribes cultural and religious significance to many sites in

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[97] Petition at 13.

[98] 16 U.S.C. § 470 *et. seq.*

[99] Petition at 14.

[100] *Id.* at 13.

that area."[101] Thus, per the Oglala Sioux Tribe's right under the NHPA, "the NRC cannot make [cultural resource] determination[s] without consultation with the Tribe."[102]

With regard to cultural resource information contained in the Application, Petitioner makes the following allegations of deficiency:

> CBR's Renewal Petition offers Table 2.4-1 which details the cultural resources in the area. However, the Tribe has neither had the opportunity to evaluate the completeness of this list, nor the opportunity to evaluate the accuracy of the significance ascribed to the items on the list. Section 7.8 of the Application provides that '[a]ny future construction activities will avoid these identified resources and coordination will be maintained with the Nebraska State Historical Society.' Further, Section 4.8 asserts that the National SHPO has determined that the cultural resources are not eligible for inclusion on the National Register, but no consultation has been done with the Tribe. However, this ignores the participation of the Tribe for these identified Native American cultural resources. The participation of state agencies is not adequate under NEPA.[103]

Section 106 of the NHPA requires the NRC, as a federal agency, before the issuance of the subject renewal license, to "take into account the effect of the [issuance of the license] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[104] Pursuant to Section 101(d)(6)(B) of the NHPA, the NRC is required to consult with any Indian Tribes which "attach[] religious and cultural significance to historic properties that may be affected" by the issuance of the renewal license.[105] The NRC must ensure consultation in the Section 106 evaluation process provides to such interested Tribes "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and

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[101] *Id.* at 15.

[102] *Id.*

[103] *Id.*

[104] 16 U.S.C. § 470f (2008).

[105] 36 C.F.R. § 800.2(c)(2)(ii).

cultural importance, articulate its views on the [effect of the issuance of the license] on such properties, and participate in the resolution of adverse effects."[106]

As Section 106 of the NHPA imposes this responsibility on the NRC, not the Applicant in the preparation of the subject Application, Petitioner's claim against the Applicant's failure to consult is misdirected and, at this time, unripe (as the NRC has not yet even begun the required Section 106 evaluation process). As such, claiming that the Applicant has not satisfied the NHPA consultation duty, the Petitioner does not present with Contention B an issue material to the findings the NRC must make in support of the action involved in this proceeding.

In addition, Petitioner does not assert that any of the referenced cultural resources were substantively ignored or under-evaluated. Petitioner has also not asserted that any of the referenced cultural resources will be adversely impacted by the operation of the CBR facility.

Therefore, in light of the foregoing, the Board should deny 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.[107]

Petitioner contends that "CBR ignores the White River as a potential surface water that is affected in the event of an accident."[108] Petitioner first argues that CBR contradicts itself, in 7.5.4, of the Application because it references there the Squaw Creek and English Creek, both "within the area of the license," of the White River.[109] Petitioner relies on the expert opinion of

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[106] 36 C.F.R. § 800.2(c)(2)(ii)(A).

[107] Petition at 16.

[108] *Id.*

[109] *Id.*

Dr. LaGarry to provide support for the Contention:

> The White River alluvium can receive contaminants from three sources: a) from surface spills at the Crow Butte mine site; b) from waters transmitted through the Chamberlain Pass Formation where it is exposed at the land surface; and c) through faults. Contaminants within the White River can be transmitted into the areas where the alluvium intersects faults downstream from Crawford. Once into the White River alluvium, every rain event will push the contaminants a little bit downstream. In the case of the White River, downstream is to the [north – northeast] and directly onto Pine Ridge Reservation. Residential users, agricultural users, wildlife, and the City of Crawford all receive water supplies from the White River alluvium.[110]

Petitioner also cites to the expert report by Paul Ivancie and W. Austin Creswell, agreeing with Dr. LaGarry "that the White River alluvium should be evaluated for extent of contamination."[111]

However, the Petitioner has not shown more than mere speculation that aquifers communicate and therefore does not provide a valid basis for this contention. In particular, LaGarry asserts merely that it "could migrate away from Crow Butte Resources well fields" and that it "… can receive contaminants…from waters transmitted through the Chamberlain Pass Formation." [112] But, LaGarry fails to satisfy Section 2.309(f) (1) (vi) in that it does not specify that communication occurs between aquifers. In addition, neither LaGarry nor other support cited by Petitioner challenges the discussion about aquifer tests at Section 2.7.2.3 at 2-153 of the application. As to the foregoing, the Petitioner has not satisfied the elements of 10 C.F.R. § 2.309(f) (1) (vi). The Petitioner does not identify what contaminants it references in Contention C, nor does the Petitioner indicate what effect such contaminants would have on the environment.

Aside from cursory allusion, Petitioner provides no evidence in support of the position

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[110] Expert Opinion of Hannan E. LaGarry, Ph. D., at *3 (ML082170264) (hereinafter "LaGarry").

[111] Expert Opinion of Paul G. Invancie, PG, and W. Austin Creswell, PE, "Summary of Recommendations and Opinions on CBR," at *2-3 (dated July 28, 2008).

[112] LaGarry at 3.

that surface spills have occurred or have the potential to occur at the Crow Butte site. Petitioner has also not demonstrated with sufficient specificity the potential of such to spills to enter or migrate into the White River. Dr. LaGarry provides only conclusory supposition, without factual support or expert argument, that the hydraulic flow between geological layers would carry "contaminated water" from the Chamberlain Pass Formation into the White River alluvium. As such, Petitioner has presented no information to support the position that the hydraulic flow would be as assumed by the Petitioner in order to make its claim. Petitioner's failure to establish by factual or expert support a pathway or mechanism for the alleged contaminants to flow from the CBR mining facility to the Petitioner's referenced water resources renders Petitioner's claim unsupported and, thus, conjecture insufficient per 10. C.F.R. § 2.309(f)(1)(vii).

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 Reservation communicate with each other, resulting in the possibility of contamination of the potable water.[113]

In the discussion of Environmental Contention D, the Petitioners cite the ensuing portion of Section 7.4.3 of the Application:

> Because the Basal Chadron Sandstone (production zone) is a deep confined aquifer, no surface water impacts are expected. Further, the geologic and hydrologic data presented in Sections 2.6 and 2.7, respectively, demonstrate that (1) the occurrence of uranium mineralization is limited to the Basal Chadron Sandstone; and (2) the Basal Chadron is isolated from underlying and overlying sands. Hence, the mining operations are expected to impact water quality only in the Basal Chadron Sandstone, and restoration operations will be conducted in the Basal Chadron following completion of mining.[114]

The Petitioner contends that as "CBR's Application uses [the] assertion that the [above

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[113] Petition at 18.

[114] *Id.* at 20.

referenced] aquifers do not communicate to support its contention that the ISL mining is not a threat to the water sources of the surrounding areas."[115] "If the aquifers do communicate," as the Petitioner contends that they do "whether by faults or other means, that calls into question the true safety of [ISL mining at the CBR site]."[116] In support of the proposition of the possibility of hydraulic communication between the Chadron and Brule aquifers, the Petitioner cites to the referenced report of Dr. LaGarry.[117] Based on his analysis of the stratigraphy of the water-bearing rock layers in Northwestern Nebraska, Dr. LaGarry, in his expert opinion posits that there are "faults and fractures transect[ing] all major bedrock units" listed in his analysis, including the Chamberlain Pass Formation, the Chadron Formation, and the Brule Formation.[118] Given the presence of these faults, Dr. LaGarry asserts that there is a "potential connect[ion between] the uranium-bearing Chamberlain Pass Formation to modern river alluvium," and a potential "connect[ion between] Chamberlain Pass Formation to the overlying secondary porosity of the Brule Formation."[119] As to the potential for such faults to act as pathways for contaminants, Dr. LaGarry states

> [t]hese faults can receive contaminants from three sources: a) from surface spills into the White river alluvium; b) from waters transmitted through the Chamberlain Pass Formation; and c) from underground excursions, which can of either lixiviant or uranium-laden water. Once into the faults, contaminants could migrate along the groundwater gradient (which is generally eastwards) northeastward towards the Pine Ridge Reservation or southeastward toward Chadron and the majority of the remaining High Plains Aquifer. Uranium could also be drawn upwards into parts of the High Plains Aquifer by high capacity irrigation wells, some of which are known to be within major fault

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[115] *Id.* at 19.

[116] *Id.*

[117] *Id.* at 20-21.

[118] LaGarry at 2-3.

[119] *Id.* at 3.

zones (northernmost Sheridan County, Nebraska).[120]

Dr. LaGarry, however, does not confirm or provide data or information that such faults exist at the Applicant's site that would provide connection between the Basal Chadron and overlying aquifers. The Applicant provides information that no such faults exist at the site. See Section 2.6.2.5 at 2-113. Thus, Dr. LaGarry fails to satisfy Section 2.309(f) (1) (vi). In addition, neither LaGarry nor other support cited by Petitioner challenges the discussion about aquifer tests at Section 2.7.2.3 at 2-153 of the application. As to the foregoing, the Petitioner has not satisfied the elements of 10 C.F.R. § 2.309(f) (1) (vi). The NRC Staff does not understand the Petitioner's reference to the "*Winters* doctrine" in connection with Contention D.[121] In *Winters v. United States*, the Supreme Court held that when an Indian reservation is created, the United States government reserves the right to sufficient water to meet the needs of the reservation.[122] In absence of an express grant of water rights to a reservation, an implied water right vests with the creation of the reservation.[123] Therefore, under the *Winters* doctrine, as it is called, an Indian tribe possesses a reserved right of surface waters on and abutting its reservation.[124] The Petitioner has not made any attempt to explain why this doctrine applies to issues or matters addressed in the Application or how such reference to the doctrine manifests a dispute therewith. A petitioner must provide sufficient explanation as to the significance thereof of

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[120] *Id.*

[121] *See* Petition at 20.

[122] 207 U.S. 564, 576-77 (1908).

[123] *Arizona v. California*, 373 U.S. 546, 599-600 (1963).

[124] *See Cappaert v. United States*, 426 U.S. 128, 138 (1976).

materials and documents referenced in support of the contention.[125] Thus, the NRC Staff believes that the Board should disregard Contention D.

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."[126]

The Petitioner alleges that "CBR has disposed of waste water in a manner that is inconsistent with the requirements for its application," and, further, that "CBR's procedures demonstrably do not protect health, nor does it minimize danger to life or property."[127] In support of these allegations, the Petitioner cites to a complaint against CBR filed by the NDEQ in the District Court for Lancaster County, Nebraska in May, 2008.[128] The complaint contains three claims regarding purported violations of an UIC permit (No. NE0122611) held by the Applicant.[129] As the Petitioner notes, the parties to that proceeding entered into a consent decree, out of which Applicant agreed to a civil penalty.[130] As documented in the consent decree, the Applicant, as defendant, entered into the consent decree for the purpose of settlement only, without admitting any of the allegations of the Complaint.[131]

Neither mere speculation nor bare assertions are sufficient to allege the admission of a

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[125] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

[126] Petition at 21.

[127] *Id.* at 22.

[128] *Id.* at 21-22.

[129] NDEQ Complaint at 1-3 (State of Nebraska, Nebraska Dept. of Environmental Quality v. Crow Butte Resources, Inc., Dist. Ct. of Lancaster, NE Case No: CI08-2248).

[130] Petition at 21.

[131] State of NE, NDEQ . . . . Consent Decree (May 23, 2008).

proffered contention.[132] Speculation and bald assertions are all the Petitioner provides with regard to Contention E. The Petitioner has not provided a basis for Contention E, instead referencing, sans sufficient explanation, the aforementioned complaint filed by NDEQ. By its explicit terms, the Consent Decree does not speak to the veracity of the allegations set forth in NDEQ's complaint. As Petitioner has not proffered any additional information in support of Contention E, Petitioner rests solely on the allegations set out in the complaint. The Petitioner makes no effort to substantiate the claims set out in NDEQ's complaint. Petitioner has also failed to supply sufficient information to manifest that a genuine dispute exists between itself and the Applicant as to a material issue of fact. Furthermore, issues of state law are matters properly of state governments and agencies, and, as such, not the province of the NRC in its licensing proceedings.[133] Therefore, the issue raised by the Petitioner as Contention E is outside the scope of this proceeding.

In light of the foregoing, the Board should deny Contention E.

III. Motion for Discretionary Intervention

Petitioner seeks discretionary intervention, pursuant to 10 C.F.R. § 2.309(e), if intervention is denied as a matter of right.[134] Based on the reasoning set forth immediately hereafter, the NRC Staff requests that the Board deny Petitioner's motion for discretionary intervention. A request for discretionary intervention can only be contemplated by the Board when "at least one requestor/petitioner has established standing and at least one admissible

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[132] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[133] *Northern States Power Co.* (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978).

[134] Petition at 22.

contention has been admitted so that a hearing will be held."[135] Also, a person seeking discretionary intervention must, in addition to addressing the standing factors of 10 C.F.R. § 2.309(d)(1), address factors weighing in favor of intervention and factors weighing against intervention.[136] At this time, no person has been admitted into this proceeding, so Petitioner's request is unripe. Petitioner has also failed to address the additional factors set out in 10 C.F.R. § 2.309(e)(1)-(2). Therefore, the Board should deny Petitioner's request for discretionary intervention.

CONCLUSION

In light of the foregoing analysis, the Staff submits that the Petition should be denied for failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d). Additionally, the Staff respectfully submits that the Board should deny, for failure to comply with the admissibility standards of 10 C.F.R. § 2.309(f)(1), the contentions proffered by the Petitioner. Additionally, the Staff respectfully submits that the Petitioner's request for discretionary intervention pursuant to 10 C.F.R. § 2.309(e) should be denied for failing to meet the requirements thereof.

Respectfully submitted,

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[135] 10 C.F.R. § 2.309(e).

[136] *Id. at* § 2.309(e)(1)-(2).

Executed in Accord with 10 CFR 2.304(d)
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Dated at Rockville, Maryland
This 25th day of August, 2008

August 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket Nos. 40-8943
	)	
(License Renewal for the In Situ Leach	)	
Facility, Crawford, Nebraska)	)	ASLBP No. 08-867-08-OIA-BD01

NRC STAFF'S RESPONSE IN OPPOSITION TO PETITIONER'S REQUEST FOR DISCRETIONARY INTERVENTION AND PETITION FOR HEARING AND/OR TO INTERVENE OF OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h), the NRC Staff (hereinafter "Staff") files this response to the above-listed petition for hearing (hereinafter "Petition") filed on July 28, 2008. For reasons explained hereafter, the Staff submits that the Petition should be denied for (a) failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d), and (b) failing to satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, the Staff respectfully submits that the Petitioner's request for discretionary intervention pursuant to 10 C.F.R. § 2.309(e) should be denied for failing to meet the requirements thereof.

BACKGROUND

Crow Butte Resources, Inc. (hereinafter "CBR" or "Applicant') is licensed to operate an in-situ leach (hereinafter "ISL") recovery facility in Crawford, Dawes County Nebraska.[4] On November 27, 2007, CBR sent by letter to the NRC a license amendment application (hereinafter "Application") (ADAMS ML073480266 & ML073480267), requesting renewal of its

[4] CBR possesses a source material license, SUA-1534.

source materials license for the standard 10-year period. In a letter to CBR dated March 28, 2008, the NRC Staff stated that it had found, per its administrative review, the Application acceptable to begin a technical review.[5] On May 27, 2008, a notice of opportunity to request a hearing or petition to intervene was published in the Federal Register, with a deadline for filing such on July 28, 2008.[6] On July 28, the NRC received the subject petition from the Oglala Delegation of the Great Sioux Nation Treaty Council (hereinafter "Petitioner") to which the NRC Staff herein responds. The NRC Staff was not served with the subject petition and first became aware of it on August 11, 2008.

DISCUSSION

I. Standing

A. Legal Requirements for Standing

Any person or organization that requests a hearing or seeks to intervene in a Commission proceeding must demonstrate standing to intervene in the proceeding.[7] Section 189a of the Atomic Energy Act requires that the NRC provide a hearing "upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such a proceeding."[8] The Commission has implemented the mandate of Section 189a in 10 C.F.R. § 2.309(d)(1), which provides, in relevant part, that a request for hearing or petition to intervene must state:

(i) The name, address and telephone number of the requestor or petitioner;

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[5] Letter from William von Till to Stephen P. Collings (dated March 28, 2008) (ML080720341).

[6] Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, 73 Fed. Reg. 30,426 (May 27, 2008).

[7] 10 C.F.R. § 2.309(a).

[8] 42 U.S.C. § 2239(a)(1)(A).

> (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.[9]

In determining whether a petitioner has established the requisite "interest" to manifest standing under the Commission's regulations, the Commission has consistently directed licensing boards to apply, as guidance, contemporary judicial concepts of standing, as stated and developed in federal court case law.[10] Judicial concepts of standing have been consistently interpreted by the Commission to mean that, in order to demonstrate standing, "a petitioner must (1) allege a concrete and particularized injury that is (2) fairly traceable to the challenged action and (3) likely to be redressed by a favorable decision."[11] The shorthand by which the Commission has referred to the foregoing three criteria is, respectively, "'injury in fact,' causality, and redressability."[12] "Injury in fact" must be actual or threatened,[13] but it cannot be "conjectural" or "hypothetical."[14] Nor can the threat of injury be too speculative.[15] Additionally, the "injury in fact" alleged by a petitioner must lie within the "zone of interests" protected by the

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[9] 10 C.F.R. § 2.309(d)(1).

[10] *See e.g., Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998) ("When determining whether a petitioner has established the necessary 'interest' under subsection (d)(1), the Commission has long looked for guidance to judicial concepts of standing.") (*citing Quivira Mining Co.* (Ambrosia Lake Facility), CLI-98-11, 48 NRC 1, 5-6 (1998) *and Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995)).

[11] *Id.* at 195 (*citing Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)).

[12] *Id.*

[13] *Id.* at 195 (*citing Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987)).

[14] *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994) (*citing O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

[15] *Id.* at 72 (*citing Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

statutes governing the proceeding: either the AEA or the National Environmental Policy Act of 1969 (hereinafter "NEPA") (as amended) 42 U.S.C. §§ 4321, *et seq.* (2000).[16]

A petitioner must also establish a "causal link" between the alleged "injury in fact" and the challenged action.[17] A determination that this causal link exists, that the injury alleged is fairly traceable to the challenged action does "not depend on whether the cause of the injury flows directly from the challenged action, but whether the chain of causation is plausible."[18] Nonetheless, the Commission has required that there be a "realistic threat … of direct injury."[19] Finally, as to the element of redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[20]

1. "Proximity Plus" Presumption of Standing

Although in nuclear power reactor construction permit and operating license proceedings, the Commission has applied a presumption that proximity within 50 miles of a plant *alone is enough* to demonstrate standing (without having to address "injury in fact," causation, and redressability),[21] the Commission has determined that, outside of those

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[16] *Quivira Mining*, CLI-98-11, 48 NRC at 6 ("Consistent with an additional, so-called 'prudential' requirement of standing, the Commission has also required the petitioner's interests to fall, arguably, within the 'zone of interests' protected or regulated by the governing statute(s)—here, the AEA and NEPA.").

[17] *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998).

[18] *Id.* at 276 (1998) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 (1994)).

[19] *Int'l Uranium (USA) Corp*. (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 74).

[20] *Sequoyah Fuels*, CLI-94-12, 40 NRC at 76 (*internal quotation marks omitted*) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

[21] *See, e.g., Virginia Elec. Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-522, 9 NRC 54, 56 (1979).

proceedings, a presumption based on geographical proximity alone is not enough to demonstrate standing.[22] Instead, in these other proceedings, such as material license proceedings, the Commission has decided to apply a "proximity plus" analysis: "[a] presumption of standing based on geographic proximity may be applied in cases … where there is a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences."[23] Whether a proposed action bears an "obvious potential for offsite consequence," and, if so, at what distance to the radioactive source can a petitioner be presumed to be affected, is determined "on a case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."[24] The maximum distance from which a petitioner must live or work to the source of radiological material in order to invoke the "proximity plus" presumption "depends on the danger posed by the source at issue."[25]

2. "Organizational" and "Representational" Standing

In order for an organization to establish standing as a petitioner, it must show "either immediate or threatened injury to its organizational interests or to the interests of identified members."[26] An organization attempting to assert standing on its own behalf ("organizational" standing) "must demonstrate a palpable injury in fact to its organization interests that is within the zone of interests protected by the AEA or NEPA."[27] An organization attempting to assert

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[22] *In the matter of USEC, Inc.* (American Centrifuge Plant), CLI-05-11, 61 NRC 309, 311 (2005).

[23] *G.I.T.*, CLI-95-12, 42 NRC at 116 (*citing Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22).

[24] *Id.*

[25] *Sequoyah Fuels*, CLI-94-12, 40 NRC at n.22.

[26] *G.I.T.*, CLI-95-12, 42 NRC at 115.

[27] *Hydro Resources, Inc.* (2929 Coors Road, Suite 101, Albuquerque New Mexico 87120) LBP-98-9, 47 (continued. . .)

standing on behalf of one or more of its constituent members ("representational" standing) "must demonstrate how at least one of its members may be affected by the licensing action . . . must identify that member by name and address, and must show . . . that the organization is authorized to request a hearing on behalf of that member."[28]

B. Petitioner's Argument in Support of Standing

Petitioner states that "[t]he Oglala Delegation of the Great Sioux Nation Treaty Council is the unbroken traditional entity established by the Oglala Lakota to negotiate treaties between the Oglala Lakota and the United states, and to ensure enforcement of the same."[29] The Delegation is "the only entity selected and maintained through the traditional governing mechanisms of the Oglala Lakota," and, as such, "is beholden only to the traditions of the Oglala Lakota and to the treaties."[30]

Petitioner states, "relevant to the Application," the two most important treaties to which the Oglala Sioux is a party, "are the Fort Laramie Treaties of 1851 and 1868. In each Treaty, large tracks of land, specifically including all the land and water resources currently occupied by the Crow Butte Mine, were retained by the Lakota People."[31]

Petitioner contends that "[i]t is hard to conceive of a Petitioner with a greater claim of standing than the Oglala Delegation of the Great Sioux Nation Treat Council, represented in this

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(. . .continued)

NRC 261, 271 (1998).

[28] *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI) CLI-00-14, 52 NRC 37, 47 (2000).

[29] Petition at 2.

[30] *Id.*

[31] *Id.*

request by Chief Oliver Red Cloud."[32] Petitioner states that Chief Red Cloud's affidavit describes, "in painful detail, what he, his ancestors, and the Oglala Lakota in general, have suffered at the hands of the United States and its predecessors."[33]

B. NRC Staff's Response to Petitioner's Argument for Standing

While, nonetheless, Petitioner contends that it is hard to conceive of a party with a greater claim to standing, Petitioner has not demonstrated that claim in accordance with 10 C.F.R. § 2.309(d)(1). Seeking to establish standing as an organization, Petitioner fails to either (1) assert standing on behalf of one of its members who may be affected by this proceeding or (2) demonstrate a palpable injury to its organizational interests. In support of standing, Petitioner provides no mention of what injury or injuries upon which it seeks to base its standing. While Petitioner does cite to treaties which the Petitioner asserts are "relevant to the Application,"[34] Petitioner does not explain why such are relevant to the Application, nor what relationship such treaties have to Petitioner's alleged "injury in fact" in support of standing. In support of standing, a person or organization must demonstrate a "concrete and particularized" "injury in fact."[35] Because Petitioner has not demonstrated that it has an "injury in fact," the Board should deny the Petitioner standing, and, correspondingly, deny the Petition.

II. Contention Admissibility

A. Legal Standards for Contention Admissibility

In addition to a show of standing, a petitioner, in order to gain admission to a hearing as

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[32] *Id*.

[33] *Id*.

[34] *Id.*

[35] *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

a party, must submit at least one contention that meets the admissibility requirements of 10 C.F.R. § 2.309(f)(1).[36] For each contention a petitioner wishes to have admitted at hearing, the petitioner 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 refereces 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.[37]

Additionally, a contention must be within the scope of the proceeding as defined by the notice of hearing in order to be admissible.[38] The contention rule is "strict by design."[39] The rule operates as a "[t]hreshold standard [] necessary to ensure that hearings cover only genuine and pertinent issues of concern and that the issues are framed and supported concisely enough at the outset to ensure that the proceedings are effective and focused on real, concrete issues."[40] As such, failure to comply with any of the foregoing elements of 10 C.F.R. §

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[36] *See* 10 C.F.R. § 2.309(a).

[37] *Id.* at § 2.309(f)(1).

[38] *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

[39] *See Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

[40] Changes to Adjudicatory Process, 69 Fed. Reg. at 2,182, 2,189-90 (Jan. 14, 2004).

2.309(f)(1) is grounds for a contention's dismissal.[41] Commission practice does not "permit 'notice pleading,"[42] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s]."[43] A petitioner may not rely on mere speculation nor base allegations as support for the admission of a proffered contention.[44] If a petitioner fails to provide sufficient support for proffered contentions, it is not within the authority of a Board to construct assumptions of fact to shore up those deficiencies.[45] Similarly, a petitioner must provide sufficient explanation as to the significance thereof of materials and documents referenced in support of the contention.[46]

B. Petitioner's Proposed Contentions

1. Environmental Contention "A"[47]

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[41] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999); *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991); *Louisiana Energy Servs.* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 54 (2004).

[42] *N. Alt. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

[43] *Id.* (*quoting Baltimore Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998)).

[44] *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

[45] *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995).

[46] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

[47] For the sake of clarity and convenience of reference, the NRC Staff has assigned a letter in chronological order to each of the Petitioner's proposed contentions.
(continued. . .)

Petitioner "specifically makes an environmental contention that artifacts and evidence of ancient aboriginal occupancy in the Crow Butte Mine area is not being adequately investigated or addressed."[48] Given that the land now occupied by the Crow Butte Mine once was inhabited by the Oglala Sioux, Petitioner asserts that "[w]hatever ancient camps or artifacts that may be found in the area of the Crow Butte Mine are likely to have been left by … Oglala Sioux."[49] As such, "[t]he Oglala Delegation of the Great Sioux Nation Treaty Council has a vested interest in any of the artifacts or historical evidence that has been, or may be discovered, in the Crow Butte area . . . ."[50]

The foregoing environmental contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). What Petitioner references as its environmental contention does not constitute a specific statement of law or fact to be raised. Petitioner does not indicate what investigation to which it makes reference and disagrees. Petitioner does not provide any explanation of its purported disagreement with that investigation; likewise, Petitioner provides no statement as to how its disagreement is within the scope of the proceeding or how it is material to a finding the NRC must make. No factual discussion or expert opinion is provided in support of Petitioner's purported disagreement. Making no reference to portions of the Application, Petitioner presents no information to determine whether a general dispute with the Applicant exists. Commission practice does not

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(. . .continued)

[48] Petition at 3.

[49] *Id.*

[50] *Id.*

"permit 'notice pleading,"[51] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[52] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[53] As all the Petitioner has proffered is unsupported assertions and speculation, the Board should reject the foregoing environmental contention.

2. Environmental Contention "B"

Petitioner "makes environmental contention that many 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 the operations of the Crow Butte Mine."[54] In support of its contention, Petitioner states that "[t]he Pine Ridge Reservation is in the pathway of contaminants from the ISL uranium mining operations of the Applicant described in the LRA," and, further, that "[t]he Pine Ridge Reservation is downstream of the Crow Butte Mine facility."[55]

The foregoing environmental contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). It is unclear from the text of the contention what issue the Petitioner is raising. Regardless, Petitioner provides no basis for the issue it raises with the contention. It provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. The Petitioner does not proffer any factual discussion or expert opinion in support of its contention,

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[51] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC 201, at 219.

[52] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[53] *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 203.

[54] Petition at 4.

[55] *Id.*

nor does it provide any information to evaluate whether it has a genuine dispute with the Applicant. Commission practice does not "permit 'notice pleading,"[56] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[57] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[58] As all the Petitioner has proffered as the above environmental contention is baseless speculation, the Board should reject the above contention.

3. Environmental Contention "C"

Petitioner "makes an environmental contention that the 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."[59] No other statement in the Petition appears to reference or be made in support of this proposed environmental contention.

The foregoing environmental contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Petitioner does not raise with this environmental contention a specific issue of law or fact; Petitioner provides no basis for its contention. It provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. The Petitioner does not proffer any factual discussion or expert opinion in support of its contention, nor does it provide

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[56] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[57] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[58] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[59] Petition at 4.

any information to evaluate whether there it has a genuine dispute with the Applicant. Commission practice does not "permit 'notice pleading,"[60] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[61] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[62] Therefore, as the Petitioner has only provided baseless allegations and speculation, the Board should reject the above contention.

4. Environmental Contention "D"

With regard to "[w]ildlife, including antelope, deer, elk and fish" which the Petitioner purports "provide food for a number of Oglala Lakota," Petitioner "makes environmental contention that these animals are adversely affected by the operation of the Crow Butte Mine through the bioaccumulation of radioactive materials from the surrounding environment."[63]

The foregoing environmental contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Simply alleging that wildlife is adversely affected through the bioaccumulation of radioactive materials is not sufficiently particularized to raise a specific issue of fact to be litigated in this proceeding. Petitioner has provided no basis for its allegation of bioaccumulation. Petitioner provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. The Petitioner does not proffer any factual discussion or expert opinion in support of its allegation of bioaccumulation, nor, failing to cite any portions of the Application, does it provide any information to evaluate whether there it has a genuine dispute

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[60] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[61] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[62] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[63] Petition at 4-5.

with the Applicant. Commission practice does not "permit 'notice pleading,"[64] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[65] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[66] Composed solely of conclusory assertions, the Board should reject the above contention.

5. Miscellaneous Contention "E"

Petitioner "makes miscellaneous contention that the safety procedures imposed upon Applicant by the [NRC], and Applicant's efforts at compliance with said procedures, are insufficient to adequately protect the land and water resources in the region, as evidenced by the current state of degradation."[67] Petitioner also states that "[t]he Oglala Lakota Delegation of the Great Sioux Nation Treaty Council … disputes the sufficiency of the resource protections afforded by the United States and its sub-agencies, specifically the Nuclear Regulatory Commission."[68]

The foregoing miscellaneous contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Petitioner fails to allege with specificity the issues it intends to raise with this contention: it makes no reference to the specific safety procedures upon with which it directs its challenge, nor does it state what is meant by the "current state of degradation." Petitioner offers no explanation or basis for its contention. Petitioner provides no information to assess whether the contention is within the scope of this

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[64] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[65] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[66] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[67] Petition at 5.

[68] *Id.*

proceeding or relates to a material finding the NRC must make. To the extent, the Petitioner appears to be challenging the adequacy of NRC's safety regulations, such challenge in this proceeding is impermissible. *Louisiana Energy Services* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005). Citing to no portion of the Application, Petitioner does not demonstrate that it has a genuine dispute with the Applicant as to the issue raised by this contention. Commission practice does not "permit 'notice pleading,'"[69] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[70] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[71] As all the Petitioner has proffered is speculation, the Board should reject the foregoing contention.

5. Technical Contention "F"

Petitioner "make[s] technical contention that the Crow Butte Mining 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 aquifer."[72] As to the Applicant's claims "that its net consumption of water is only approximately 500,000 gallons per year," Petitioner asserts that such is not true because "[t]he water that is returned to the aquifer, which the Applicant claims it does not consume, can no longer be considered clean or fresh, but instead is contaminated with detectable levels of Uranium, Arsenic and other radioactive materials."[73] Petitioner also states

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[69] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[70] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[71] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

[72] Petition at 5.

[73] *Id.*

that "[t]his permissible, slow-poisoning of our water is likely the proximate cause of the environmental contentions raised above."[74]

The foregoing miscellaneous contention must be rejected because as to it Petitioner has not satisfied any of the elements of 10 C.F.R. § 2.309(f)(1). Petitioner fails to allege with specificity the issues it intends to raise with this contention, citing only baseless speculations. Correspondingly, Petitioner offers no basis for its contention. Petitioner provides no information to assess whether the contention is within the scope of this proceeding or relates to a material finding the NRC must make. Petitioner gives no factual argument or expert opinion as to the amount of water it alleges the Applicant actually consumes as part of operations or as to the alleged contamination of the re-injected water. Also, Petitioner does not offer sufficient information to assess whether it has a genuine dispute with the Applicant as to the issues raised by this contention. Commission practice does not "permit 'notice pleading,"[75] and, therefore, the Commission does not permit the "'filing of vague, unparticularized contention[s],' unsupported by affidavit, expert, or documentary support."[76] A petitioner may not rely on mere speculation nor bare assertions as support for the admission of a proffered contention.[77] Given that all Petitioner has provided is baseless allegations and speculation, the Board should reject this contention.

III. <u>Motion for Discretionary Intervention</u>

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[74] *Id.*

[75] *N. Alt. Energy Serv. Corp.*, CLI-99-6, 49 NRC at 219.

[76] *Id.* (*quoting Baltimore Gas & Elec. Co.*, CLI-98-25, 48 NRC at 349).

[77] *See Fansteel, Inc.,* CLI-03-13, 58 NRC at 203.

Petitioner seeks discretionary intervention, pursuant to 10 C.F.R. § 2.309(e),[78] if intervention is denied as a matter of right.[79] Based on the reasoning set forth immediately hereafter, the NRC Staff requests that the Board deny Petitioner's motion for discretionary intervention. A request for discretionary intervention can only be contemplated by the Board 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."[80] Also, a person seeking discretionary intervention must, in addition to addressing the standing factors of 10 C.F.R. § 2.309(d)(1), shall also address factors weighing in favor of intervention and factors weighing against intervention.[81] At this time, no person has been admitted into this proceeding, so Petitioner's request is unripe. Petitioner has also failed to address the additional factors set out in 10 C.F.R. § 2.309(e)(1)-(2). Therefore, the NRC Staff moves that the Board deny Petitioner's request for discretionary intervention.

CONCLUSION

For the reasons set forth above, Staff submits that the Petition should be denied for (a) failing to comply with the standing requirements set forth in 10 C.F.R. § 2.309(d), and (b) failing to satisfy the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Additionally, the Staff respectfully submits that the Petitioner's request for discretionary intervention pursuant to 10 C.F.R. § 2.309(e) should be denied for failing to meet the requirements thereof.

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[78] The Staff notes that the Petition references as support "10 CFR Section 2.309(d)." Petition at 6.

[79] *Id.*

[80] 10 C.F.R. § 2.309(e)

[81] *Id.* at § 2.309(e)(1)-(2).

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)
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Dated at Rockville, Maryland
This 25th day of August, 2008

August 25, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROWE BUTTE RESOURCES, INC.	)	Docket No. 40-8943
	)	
	)	
(License Renewal Application, In Situ)	)	ASLBP No. 08-867-08-OIA-BD01
Leach Facility, Crawford, NE	)	
	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Name of Party:	NRC Staff

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)

Andrea' Z. Jones
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 25th day of August, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
CROW BUTTE RESOURCES, INC.	)	Docket Nos. 40-8943
	)	
(License Renewal for the In Situ Leach	)	
Facility, Crawford, Nebraska)	)	ASLBP No. 08-867-08-OIA-BD01

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Dated at Rockville, Maryland
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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. 08-867-08-OLA-BD01
(License Renewal for the In Situ Leach Facility,	)	
Crawford, Nebraska)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPONSE TO PETITIONERS' CONSOLIDATED REQUEST FOR HEARING AND PETITION FOR LEAVE TO INTERVENE, NRC STAFF'S RESPONSE IN OPPOSITION TO PETITIONERS' REQUEST FOR HEARING AND/OR INTERVENE OF THE OGLALA SIOUX TRIBE, NRC STAFF RESPONSE IN OPPOSITION AND/OR TO INTERVENE OF OGLALA DELEGATION OF THE GREAT SIOUX NATION TREATY COUNCIL, NOTICES OF APPEARANCE OF ANDREA' Z. JONES AND BRETT KLUKAN" in the above captioned proceeding have been served upon the following persons by Electronic Information Exchange this 25TH day of August, 2008:

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