

RAS B-65

DOCKETED  
USNRC

August 25, 2008 (8:00am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair

Dr. Richard F. Cole

Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.  
(In Situ Leach Facility, Crawford, NE)

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

August 22, 2008

RESPONSE TO APPLICANT'S SUBMISSION RE: STANDING

Pursuant to the August 5, 2008 Order, Confirming Matters Addressed at July 23, 2008, Oral Argument, Petitioners and the Oglala Sioux Tribe<sup>1</sup> hereby respond to Applicant's August 15, 2008 submission regarding standing ("Applicant's Brief"). During the July 23, 2008 oral argument concerning Contention E and Subpart G issues, Applicant's counsel proposed some novel arguments concerning standing to the effect that standing would need to be shown for Contention E even after standing had been determined to exist in this proceeding with respect to Contentions A-C. See Transcript of July 23<sup>rd</sup> Argument at 488. Judge Young stated during the argument that she was unfamiliar with such legal principles and asked for briefing which was responded to by Applicant with its August 15<sup>th</sup> submission of Applicant's Brief.

Petitioners and the Oglala Sioux Tribe respond that: (1) applicable NRC caselaw provides that there is no such requirement to match standing and contentions in these

<sup>1</sup> By email dated August 22, 2008, Bruce Ellison, Counsel for Debra White Plume and Owe Aku, approved of this filing and authorized the undersigned to file it on behalf of such Petitioners; and by email dated August 21, 2008, Elizabeth Lorina, Counsel to the Oglala Sioux Tribe, approved of this filing and joined in this Brief on behalf of the Oglala Sioux Tribe.

proceedings and since Petitioners have been found by this Board to have standing in this proceeding, they need not make any further showing of standing with respect to Contention E in this proceeding; and (2) if such a requirement were found to exist under Applicant's novel theories, each Petitioner, as a United States citizen and a member of the United States public, has standing with respect to Contention E because: (a) Contention E involves foreign ownership, control and domination of a nuclear materials licensee, (b) the Atomic Energy Act of 1954, as amended (the "AEA"), requires that the NRC regulate source materials in the US national interest, for the US common defense and security and protecting the US public health and safety<sup>2</sup>, and (c) Petitioners rights as members of the public are impaired and Petitioners suffer an injury that can be remedied by proper consideration and determination of the foreign ownership issue.

#### ARGUMENT

Applicant cites several US Supreme Court and NRC cases in support of its novel legal theory. However, a careful reading of these cases reveals that neither the holdings nor the dicta of these cases support Applicant's arguments. Accordingly, Applicant's arguments regarding standing for Contention E must be rejected.

Applicant correctly cites Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-9601, 43 NRC 1 (1996), for the proposition that "once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing." Id at 4 (citing Duke Power Co. v. Carolina Env. Study Group, 438 US 59, 78-81 (1978) and Sierra Club v. Morton, 405 US 727, 740 n. 15 (1972)). In Yankee Atomic

---

<sup>2</sup> See AEA Section 2012; 42 USC Section 2012.

Energy Co., the Commission also decided that “once this standing is established, the party may assert the interests of the general public in support of its claims.” Id. at 4.

Applied to the case at bar, these principles require that the Petitioners who were granted standing on Contentions A-C, be allowed to then raise any contention, including Contention E, that, if proved, will afford the party relief from the injury it relies upon for standing and/or includes the interests of the general public. Each of the Petitioners have asserted that the NRC lacks authority to grant a license to a foreign owned, controlled and dominated applicant that has taken no action whatsoever to mitigate any of the risks of foreign ownership and has failed in fact to even disclose the existence of foreign ownership and control in its Application. If proved, it would afford the Petitioners relief from the injuries they rely on for standing in this case. Further, since Petitioners were found to have standing, they may assert the interests of the general public. Accordingly, Yankee Atomic Energy Co. requires that Applicant’s novel legal arguments be rejected.

Petitioners have raised the issue of foreign ownership, domination and control and have asserted based on Applicant’s admissions that uranium mined at the licensed facility (and to be mined at the North Trend Expansion site) is being and will continue to be exported by the Canadian owned mine subsidiary, CBR, to a Canadian owned sister company for processing into nuclear fuel and will either be used for nuclear power generation in Canada or sold outside US restrictions on the international market. In support of Applicant’s position, it states that these issues and assertions are “wholly unrelated to groundwater or surface water contamination.” Applicant’s Brief at 2. Applicant goes on to argue that there is no nexus between the injury (water contamination) and Contention E (foreign ownership). Such arguments must fail.

Petitioners have argued consistently that the concealed foreign ownership is contrary to the US national interest, contrary to the US common defense and security and contrary to US public health and safety. The concrete and particularized injuries suffered by Petitioners include water contamination, water depletion and the increased threat to US national security posed when a foreign agent secretly acquires control of a US NRC licensee and is able to export yellowcake uranium and sell it internationally free of US restrictions. Further, Petitioners have listed several discrete problems created by Applicant's foreign ownership including: (1) lack of jurisdiction over foreign decisionmakers, (2) lack of jurisdiction over foreign assets to pay undercollateralized restoration costs, (3) scape-goating of US managers of the mine for acts by foreign decisionmakers, (4) reckless disregard by foreign owners of the US public health and safety which has led to (a) intentional suppression of geologic data showing fractures and faults connecting the aquifers, and (b) concealment of the acquisition of foreign ownership at the start of Cameco's creeping acquisition of Applicant.<sup>3</sup> If Petitioners' Contention E arguments are accepted, then the NRC will be found not authorized to issue the license amendment in this case. Accordingly, there is clearly standing to pursue Contention E.

Further, Applicant's reliance upon the dicta of a footnote in a recent Supreme Court case concerning campaign finance laws which stated that "standing is not dispensed with in gross" does not lead to any different conclusions. See, Davis v. Federal Election Commission, 554 US \_\_\_ (2008), slip op. at 7 (June 26, 2008). In that case, the Court found standing and stated that "the injury required for standing need not be

---

<sup>3</sup> See Transcript at 457-458, at 460-461, at 462-463, at 573-576, and at 577-579.

actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct. *Id.* at 8. Again, Davis supports the Petitioners in not having to meet any higher standing burdens than were already met and ruled on.

In its argument, Applicant cites several cases including Lewis v. Casey, 518 US 343 (1996), DaimlerChrysler Corp. v. Cuno, 547 US 332 (2006), Friends of the Earth, Inc. v. Laidlaw Env. Services, Inc., 528 US 167 (2000), and Rosen v. Tenn. Commissioner of Finance and Admin., 288F.3d 918 (6<sup>th</sup> Cir. 2002). While all these cases have some dicta helpful to Applicant, none of them provide a legal basis to support Applicant's theory. Lewis v. Casey involved a claim by 22 Arizona prisoners who had different personal attributes that affected standing (such as English or non-English speaking) and the District Court had granted a system-wide injunction where injury was found only with respect to illiterate prisoners. The Court found that the remedy must be limited to the inadequacy that produced the injury in fact that the plaintiff had established, i.e., only the illiterate prisoners had standing on issues related to literacy. *Id.* at 344. The issues raised by the Lewis case (the overbroad literacy related injunction that covered people who were literate and illiterate) are simply not present in this case where each of the Petitioners are affected and have a stake in each of the Contentions. In Footnote 6 of the Lewis case, the Court explained that

standing is not dispensed with in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies; any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, 'nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.' *Id.* at 358, citing Blum v. Yaretsky, 457 US 991, 999 (1982). (Italics in original; underlined and bold emphasis added.)

Accordingly, the Lewis case is not helpful to Applicant because, as cited, it stands for the proposition that a person does not acquire standing as to conduct “*to which he has not been subject.*” Id. Petitioners are not attempting to seek standing to litigate conduct to which they have not been subject. Rather, Petitioners have standing on Contention E due to the fact that they are subject to the conduct (impermissibly allowed foreign ownership contrary to the AEA).

We are also cognizant that admissible contentions in NRC licensing proceedings are not exactly the same as legal claims (which give rise to specific remedies for equitable or monetary relief). See, In Re: Duke Energy Corp (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 63 (2002) (contentions are determined by NRC regulations). Since there is a difference between NRC admissible contentions and legal claims, there is a difference between judicial standing for legal claims and standing for admissible contentions. Id. at 61 (the Commission has directed licensing boards to “*look for guidance to judicial concepts of standing.*”) (Emphasis added.) Accordingly, while the general judicial concepts of standing are relevant, there is nothing in the cases cited by Applicant that supports a legal decision that Petitioners lack standing on Contention E.

In DaimlerChrysler, *infra*, the Court ruled that city taxpayers did not have Article III standing to challenge the award of a franchise tax credit granted to an automobile manufacturer to induce it to remain in the city. The Court ruled that the taxpayers’ claims of disproportionate tax burdens were a form of hypothetical injury and denied standing. In the portion of the decision cited by Applicant, the Court discussed and

rejected the plaintiffs' arguments concerning Mine Workers v. Gibbs, 383 US 715 (1966) (which held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state law claims that may be viewed as part of the same case because they 'derive from a common nucleus of operative fact'<sup>4</sup> as a federal claim, citing Gibbs at 725.) (Emphasis added.) The Court in DaimlerChrysler ruled that it is not appropriate to apply the Gibbs rationale to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of Article III such as constitutional standing. Id. at 351-352. Accordingly, the dicta of DaimlerChrysler (and the cases cited in such dicta) are not helpful to Applicant.

Finally, Applicant cites Rosen v. Tenn. Comm. Of Finance and Admin., 288 F.3d 918 (2002), as part of a string cite for its novel legal theory for the proposition that "[i]t is black-letter law that standing is a claim by claim issue."<sup>5</sup> As stated above, judicial standing for claims may, but need not, provide guidance for the Board interpreting standing for admissible contentions. Rosen involved a challenge to a state medical program (intended to replace Medicaid) which would have covered 'uninsured' and 'uninsurable' individuals. After a settlement, certain "uninsurable" individuals (suffering from mental illness) brought a claim based on alleged failures to provide them with certain services. Id. at 922. The Court of Appeals held in Rosen that class action plaintiffs who were not themselves currently 'uninsurable' could not be found to have standing as to claims held by future, unidentified 'uninsurable' individuals. Id. at 929-930. In doing so, the Court simply upheld the basic principle that class representatives

---

<sup>4</sup> We note that Applicant uses the phrase "nuclear of operative fact" in Applicant's Brief at p. 4 which appears to be a typo to the Gibbs quote related to "nucleus of operative fact" and should not be read as a reference to the nuclear industry or nuclear regulation.

<sup>5</sup> Applicant's Brief at 4; Rosen at 928.

without personal standing cannot predicate standing on injuries suffered by members of the class but which they themselves have not or will not suffer. Id. at 928. Accordingly, nothing in Rosen supports Applicant's arguments concerning standing but it is merely part of a string cite stating a small element of dicta. As such, Applicant's arguments are completely unpersuasive and must fail.

### CONCLUSION

Despite the echoes<sup>6</sup> and reverberations of the dicta of these cases in the canyons of NRC regulatory law concerning standing and admissible contentions, Applicant has offered no persuasive legal authority for its novel theory that Petitioners in this NRC proceeding who have been found to have standing as to Contentions A-C should have an additional burden of showing standing as to Contention E. Applicant has not raised any holdings or persuasive dicta to guide this Board to change NRC precedent as explained in Yankee Electric Power Co. that once a party demonstrates that it has standing to intervene of its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing and that such party may assert the interests of the general public. Id. at 4.

The Yankee Electric Power Co. precedent supports Petitioners because they have been granted standing to intervene in Contentions A-C and as a result, Petitioners may raise Contention E because, if proved, it will afford them relief from the injuries upon which they rely for standing – namely, those that flow from violations of safety and environmental protections provided by the AEA and NRC regulations. Even if such

---

<sup>6</sup> Applicant's Brief at 4.



additional standing burden existed, it is met by the fact that the Petitioners are US citizens and members of the US public for which the AEA was passed and to whom the NRC owes its duties of protective regulation. Further, as has been previously argued, the trust responsibility of the United States as to the Indigenous Petitioners requires an even higher duty (meaning less of a burden to show standing). It is clear that Petitioners have standing as to all Contentions currently before the Board under applicable NRC regulations. For the reasons stated above Applicant's arguments set forth in its August 15<sup>th</sup> Brief must be rejected.

Respectfully submitted,

/s/

Bruce Ellison  
Counsel for Owe Aku and D. White Plume  
Law Offices of Bruce Ellison  
P. O. Box 2508  
Rapid City, SD 57709  
Tel: 605-348-9458  
E-mail: [belli4law@aol.com](mailto:belli4law@aol.com)



David Frankel  
Counsel for WNRC  
POB 3014  
Pine Ridge, SD 57770  
Tel: 308-430-8160  
Email: [arm.legal@gmail.com](mailto:arm.legal@gmail.com)

/s/

Elizabeth Maria Lorina  
Counsel for Oglala Sioux Tribe  
Law Office of Mario Gonzalez  
522 7<sup>th</sup> Street, Suite 202  
Rapid City, SD 57701  
E-mail [elorina@gnzlawfirm.com](mailto:elorina@gnzlawfirm.com)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Ann Marshall Young, Chair

Dr. Richard F. Cole

Dr. Fred W. Oliver

In the Matter of

CROW BUTTE RESOURCES, INC.  
(In Situ Leach Facility, Crawford, NE)

Docket No. 40-8943

ASLBP No. 07-859-03-MLA-BD01

August 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that copies "RESPONSE TO APPLICANT BRIEF RE: STANDING" in the above captioned proceeding has been served on the following persons by electronic mail as indicated by a double asterisk (\*\*), and by deposit in the United States Mail as indicated by an asterisk (\*); on this 22<sup>th</sup> day of August, 2008:

Judge Ann Marshall Young, Chair \* \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-Mail: [Ann.Young@nrc.gov](mailto:Ann.Young@nrc.gov)

Judge Fred W. Oliver \* \*\*  
10433 Owen Brown Road  
Columbia, MD 21044  
E-mail: [FWOLIVER@verizon.net](mailto:FWOLIVER@verizon.net)

Judge Richard F. Cole \* \*\*  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [Richard.Cole@nrc.gov](mailto:Richard.Cole@nrc.gov)

Crow Butte Resources, Inc. \*\*  
Attn: Stephen P. Collings  
141 Union Blvd., Suite 330  
Lakewood, CO 80228  
E-mail: [steve\\_collings@cameco.com](mailto:steve_collings@cameco.com)

Mrs. Johanna Thibault \* \*\*  
Board Law Clerk  
Atomic Safety and Licensing Board Panel  
U. S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [Johanna.Thibault@nrc.gov](mailto:Johanna.Thibault@nrc.gov)

Office of the Secretary \* \*\*  
Attn: Docketing and Service  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555  
E-mail: [Hearing.Docket@nrc.gov](mailto:Hearing.Docket@nrc.gov)  
(original & 2 copies)

Office of Comm. App. Adjudication \* \*\*  
U.S. Nuclear Regulatory Commission  
Washington, D.C 20555  
E-mail: [OCAAMAIL.Resource@nrc.gov](mailto:OCAAMAIL.Resource@nrc.gov)

Debra White Plume \*\*  
P. O. Box 71  
Manderson, SD 57756  
E-mail: [LAKOTA1@gwtc.net](mailto:LAKOTA1@gwtc.net)

Office of the General Counsel \*\*  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555

Andrea Z. Jones, Esq.  
[Andrea.Jones@nrc.gov](mailto:Andrea.Jones@nrc.gov)

Catherine Marco, Esq.  
[Catherine.Marco@nrc.gov](mailto:Catherine.Marco@nrc.gov)

Brett M.P. Klukan, Esq.  
[Brett.Klukan@nrc.gov](mailto:Brett.Klukan@nrc.gov)

Tyson R. Smith, Esq. \*\*  
Winston & Strawn LLP  
1700 K St. NW  
Washington, DC 20006  
E-Mail: [trsmith@winston.com](mailto:trsmith@winston.com)

Mark D. McGuire, Esq. \*\*  
McGuire and Norby  
605 South 14th Street, Suite 100  
Lincoln, NE 60508  
E-Mail: [mdmsjn@alltel.net](mailto:mdmsjn@alltel.net)

Bruce Ellison, Esq. \*\*  
Law Offices of Bruce Ellison  
P. O. Box 2508  
Rapid City, SD 57709  
E-mail: [belli4law@aol.com](mailto:belli4law@aol.com)

Thomas Kanatakeniate Cook \*\*  
1705 S. Maple Street  
Chadron, NE 69337  
E-mail: [tcook@indianyouth.org](mailto:tcook@indianyouth.org)

Western Neb. Resources Council \*\*  
Attn: Buffalo Bruce  
P. O. Box 612  
Chadron, NE 69337  
E-mail: [buffalobruce@panhandle.net](mailto:buffalobruce@panhandle.net)

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

Elizabeth Maria Lorina, Esq. \*\*  
Law Office of Mario Gonzalez  
522 7<sup>th</sup> Street, Suite 202  
Rapid City, SD 57701  
E-mail [elorina@gnzlawfirm.com](mailto:elorina@gnzlawfirm.com)

Thomas J. Ballanco, Esq. \*\*  
Harmonic Engineering, Inc.  
945 Taraval St., #186  
San Francisco, CA 94116  
E-mail: [harmonicengineering1@mac.com](mailto:harmonicengineering1@mac.com)

Shane C. Robinson, Esq. \*\*  
2814 E. Olive St.  
Seattle, WA 98122  
E-mail: [shane-robinson@gmail.com](mailto:shane-robinson@gmail.com)

Respectfully submitted,



David Frankel  
P. O. Box 3014  
Pine Ridge, SD 57770  
308-430-8160  
E-mail: [arm.legal@gmail.com](mailto:arm.legal@gmail.com)