

December 10, 2008

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CROW BUTTE RESOURCES' NOTICE OF APPEAL OF LBP-08-24

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), Crow Butte Resources, Inc. files, together with an attached Brief, this Notice of Appeal of the Atomic Safety and Licensing Board's November 21, 2008, Memorandum and Order, which, among other things, admitted for litigation in the above captioned proceeding nine contentions related to Crow Butte's license renewal application for the Crow Butte facility.

Respectfully submitted,

/s/ signed electronically by
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Dated at San Francisco, California
this 10th day of December 2008

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Tyson R. Smith
COUNSEL FOR CROW BUTTE
RESOURCES, INC.

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CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-24

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(a) and (c), Crow Butte Resources, Inc. (“Crow Butte” or “Applicant”) hereby appeals the Atomic Safety and Licensing Board (“Board”) decision on standing and contentions (LBP-08-24), dated November 21, 2008. That decision concerns an application by Crow Butte for renewal of its existing license at its uranium recovery operation. The Board concluded that certain petitioners had demonstrated standing in the proceeding and also that they had offered a total of nine admissible contentions. For the reasons discussed below, we disagree and urge the Commission to reverse the Board decision on both standing and admissibility of all contentions. The requests for hearing should be wholly denied.

In their hearing requests, the petitioners provided no documented evidence or testimony to support their assertions that ongoing uranium recovery operations would cause them any harm. Petitioners failed to demonstrate an injury-in-fact that could be redressed by a favorable decision. Instead, contrary to Commission precedent, the Board compiled a series of increasingly improbable suppositions, bordering on the physically impossible, to support standing. This type of analysis has been repeatedly rejected by the Commission and by reviewing courts as a basis for standing.

The proposed contentions also should be rejected. In its application, Crow Butte provided substantial evidence based on nearly 20 years of operation that the license renewal would not lead to significant offsite environmental impacts. Petitioners, however, simply point to sections of the application and state only that they disagree. In other places, they fail to even dispute any portion of the application. Such bald and conclusory statements are inadequate to support an admissible contention. To support an admissible contention, Petitioners must provide specific factual or expert support for contentions and must adequately explain the significance of the information presented. In contrast, the Board created and applied novel standards for both standing and contentions that have no legitimate legal or regulatory basis. Accordingly, the Commission should reverse the Board's findings on standing and the admitted contentions.

II. FACTUAL BACKGROUND CONCERNING CROW BUTTE'S APPLICATION FOR LICENSE RENEWAL

Crow Butte is currently licensed to operate an in-situ recovery uranium recovery facility in Crawford, Nebraska. On November 27, 2007, Crow Butte requested that the U.S. Nuclear Regulatory Commission ("NRC") renew its source material license for a 10-year period. If approved, the NRC will amend License No. SUA-1534. The proposed action is therefore license renewal, and not an initial license or an expansion of the existing facility.¹

A notice of opportunity to request a hearing was published in the *Federal Register* with a deadline for filing petitions of July 28, 2008.² Three timely petitions to intervene were

¹ On May 30, 2007, Crow Butte requested a license amendment that would allow the development of a satellite facility, the "North Trend Expansion Area," near its existing ISL operation. That application is the subject of a separate ongoing licensing proceeding.

² See "Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, and Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information (SUNSI) for Contention Preparation," 73 Fed. Reg. 30426 (May 28, 2008).

filed by: (1) the Oglala Sioux Tribe;³ (2) Beatrice Long Visitor Holy Dance, Joe American Horse, Sr., Debra White Plume, Loretta Afraid of Bear Cook, Thomas K. Cook, Dayton O. Hyde, Bruce McIntosh, Afraid of Bear/Cook Tiwahe, American Horse Tiospaye, Owe Aku/Bring Back the Way, and Western Nebraska Resources Council (“Consolidated Petitioners”);⁴ and (3) the Oglala Delegation of the Great Sioux Nation Treaty Council (“Treaty Council”).⁵ The Oglala Sioux Tribe submitted five proposed contentions; the Consolidated Petitioners submitted twenty-three proposed contentions; and the Treaty Council submitted six proposed contentions. Crow Butte and the NRC Staff responded to all three petitions opposing both standing and the proposed contentions on August 22 and August 28, 2008, respectively. On September 3, 2008, all three petitioners filed replies to the Crow Butte and NRC Staff responses.

The Board issued its decision on standing and contentions on November 21, 2008. The Board found that the Oglala Sioux Tribe had standing and admitted all five proposed contentions (Environmental Contentions A through E). The Board granted standing to Consolidated Petitioners and admitted four contentions (or parts of contentions) (Environmental Contention E, Technical Contention F, and Miscellaneous Contentions G and K). The Board’s evaluation of the standing and the admitted contentions is discussed further below.

III. REGULATORY BACKGROUND

A. Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission

³ “Request for Hearing and/or Petition to Intervene,” dated July 28, 2008.

⁴ “Consolidated Request for Hearing and Petition for Leave to Intervene,” dated July 28, 2008 (“Consolidated Petition”).

⁵ “Request for Hearing and Petition for Leave to Intervene,” dated July 28, 2008.

has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To establish standing, there must be an “injury-in-fact” that is either actual or threatened. *Id.*, citing *Wilderness Soc’y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). The injury must be “concrete and particularized,” not “conjectural” or “hypothetical.” *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Standing will be denied when the threat of injury is too speculative. *Id.*

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

In materials cases, there is no presumption of standing based on geographic proximity. Rather, standing is based on “a determination that the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.” *Ga. Inst. of Tech.* (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995). Whether a proposed action has 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.*

B. Admissibility of Contentions

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

the Board in all respects based on a clear misapplication of Commission precedent on standing and petitioners' failure to satisfy the Commission's strict standards for contention admissibility.

A. Neither the Tribe Nor the Consolidated Petitioners Have Demonstrated Standing

A petitioner must demonstrate that the alleged the injury is "concrete and particularized," not "conjectural" or "hypothetical." Conclusory allegations about potential radiological harm from the facility in general are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251. Judicial and Commission standing jurisprudence requires "realistic threat ... of direct injury." *Id.* As discussed below, the Board reached a conclusion that is inconsistent with the facts and with Commission precedent.⁶

1. *Standing of Oglala Sioux Tribe*

Based on the discussion in the petition, it is clear that petitioner's primary interest is in enforcement of treaty rights, and not the activities of Crow Butte. *See Tribal Petition*, at 2-6. The Board, in analyzing organizational standing for the Tribe, correctly rejected treaty interests as the basis for standing.⁷ LBP-08-24, at 21. The Board granted standing to the Tribe based solely on alleged injuries to cultural resources under the National Historic Preservation

⁶ The Board nowhere acknowledges the important distinction between an application for license renewal and an application for a new facility. While there might arguably be some basis for relaxing the showing needed to demonstrate standing for a new facility, whose impacts on the environment are necessarily a matter of speculation, an injury based on purely speculative impacts is less "concrete" or "particularized" where a facility has been in operation for a number of years without any evidence of offsite impacts. In such circumstances, a petitioner has the burden of showing that the potential for injury is more than mere conjecture.

⁷ Significantly, the Board did not base its finding of standing on any hydrogeologic considerations. There is no discussion of where the Tribe (or its members) draws water or any discussion of potential mechanisms of contamination. Moreover, the Tribe's petition does not include any affidavits from individual members or assert any individualized injuries. Thus, there is no basis for representational standing.

Act (“NHPA”).⁸ *Id.*, at 21-25. However, any assertion of “injury” due to the NRC Staff’s failure to consult is premature. The NRC has not yet initiated the formal consultation process. A presumption of regularity should apply. If the NRC fails to consult during the environmental review process, a new contention could be filed. But, the NRC Staff and the applicant should not be required to litigate the Tribe’s contention simply because the NRC has not yet fulfilled an obligation that it is not yet required to perform.

Moreover, Crow Butte has no obligation to consult under the NHPA. The alleged injury to the Tribe’s “right to consultation” under the NHPA — a statute that only applies to federal agencies and not to private applicants such as Crow Butte — is not caused by Crow Butte.⁹ Indeed, according to the Board, the Tribe has alleged that *the NRC Staff* (not Crow Butte) has failed to fulfill its obligation to consult. LBP-08-24, at 24. To the extent that the petitioner has even alleged an injury, injuries arising from the future actions of parties other than the applicant (in this case, hypothetical future injuries caused by NRC Staff) are not a result of the disputed application and cannot support standing. *See Private Fuel Storage, L.L.C.*

⁸ The petitioner vaguely states that Crow Butte’s use of water for its operations affects the ability of the Tribe and its members to use its water sources. Tribal Petition, at 2-6. However, the petition does not state the location or frequency of tribal members’ use of these water resources. The petition also fails to specify the aquifer from which tribal members draw water. There is simply no information regarding potential injury from Crow Butte’s operations. This is an especially glaring deficiency in light of the fact that the facility has been operating for nearly 20 years and that the Pine Ridge Reservation is over 30 miles away. Petitioner has therefore failed to demonstrate any “concrete” injury.

⁹ Although the Tribe argues in Environmental Contention B that it must be consulted on the significance of the cultural resources identified during prior field studies, the Tribe does not assert that the significance of any identified resources was underestimated or ignored. Nor has the Tribe argued that Crow Butte’s operations during the renewal period will adversely impact particular, identified resources. The application notes that potentially significant resources “have been avoided,” and that further construction activities “will avoid” these resources. Application, at 7-27. Petitioners have previously been contacted by Crow Butte regarding cultural resources and had no comments. *See Survey of Traditional Cultural Properties* (April 2, 1998) (ML082960180).

(Independent Spent Fuel Storage Installation), LBP-00-23, 52 NRC 114, 124 (2000). Thus, the grant of standing based on alleged future injury that would be caused by the NRC is an error of law and an abuse of discretion.

Moreover, in order to establish organizational standing, an organization must demonstrate a discrete institutional injury to the organization itself. *White Mesa*, CLI-01-21, 54 NRC at 252. Here, the petition fails to demonstrate organizational standing due to injuries caused by Crow Butte. Nowhere in the discussion of standing in the Tribe's petition does it mention the NHPA or a failure to consult. *See Tribal Petition*, at 2-6. It is the responsibility of an intervenor, not the Board, to provide the necessary information to support standing. *See Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 416-417 (1990).

Even assuming that the Board correctly found standing based on cultural resource claims under the NHPA, the Board erred by using a cultural resource-based injury as the basis for standing for claims regarding hydrologic and other environmental issues. The Commission in CLI-96-1 discussed the nexus between standing and contentions, stating that "once a party demonstrates that it has standing to intervene on its own accord, that party may then raise any contention that, if proved, will afford the party relief from the injury it relies upon for standing." *Yankee Atomic Electric Company* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1 (1996). The Commission went on to specifically state that an intervenor's contentions should be limited to those that will afford relief from the injuries asserted as a basis for standing. *Id.*, at n.3.

The Supreme Court recently reaffirmed the principle that standing must be shown for every single claim remarking that "standing is not dispensed in gross," and that a party "must demonstrate standing for each claim he seeks to press" and "for each form of relief that is sought." *Davis v. Federal Election Commission*, __ U.S. __, slip op. at 7 (June 26, 2008); *see*

also, *Rosen v. Tenn. Commissioner of Finance and Admin.*, 288 F.3d 918 (6th Cir. 2002) (“It is black-letter law that standing is a claim-by-claim issue.”). Standing for one claim does not suffice for all claims even where those claims arise from the same nucleus of operative fact. *DaimlerChrysler*, 547 U.S. at 352. Holding otherwise, the Court noted, would undermine other important judicial principles and permit, for example, adjudication of moot or unripe claims. *Id.*

Here, only the Tribe’s Environmental Contention B even remotely involves cultural resources. The other contentions, even if proven, would not remedy the injury (the NRC Staff’s failure to consult) relied upon by the Board for standing. Assuming that the NRC Staff fulfills its obligations to consult under the NHPA during its review of the license application and therefore “redresses” the alleged injury and “moots” the consultation contention, there would be no injury left to support standing for any other contentions. Consistent with Supreme Court and Commission precedent requiring standing for each claim, petitioners should not be allowed to litigate contentions that do not even address the harms alleged by the Tribe.

2. *Standing of Consolidated Petitioners*

The Board’s determination of standing for these petitioners also represents an error of law. First, the Board mistakenly granted representational standing to Owe Aku and WNRC through two individuals, Francis Anders and David Alan House — neither of which submitted affidavits in this proceeding. The Board apparently based its standing determination on affidavits filed in the North Trend Expansion proceeding.¹⁰ The North Trend proceeding, however, relates to the development of an entirely separate mine field, which is located several miles away from the current operation. There is no indication that those individuals wish to be

¹⁰ Crow Butte has appealed the Licensing Board decision in LBP-08-06 on several grounds, including standing. See “Crow Butte Resources’ Notice of Appeal of LBP-08-06” (May 9, 2008). That appeal is pending.

represented in this proceeding or that they desire to support a challenge to continued operation of the existing facility. Moreover, petitioners obtained numerous new affidavits, including many from the same individuals that also filed affidavits in the North Trend proceeding. Petitioners have provided no explanation of their failure to provide affidavits for Dr. Anders and Mr. House in this proceeding. They must do more than incorporate by reference standing affidavits from a different proceeding that involved a separate approval and a different facility.

The Board also granted standing to Beatrice Long Visitor Holy Dance, Debra White Plume, Loretta Afraid of Bear Cook, Thomas K. Cook, and Joe American Horse, Sr. based on claims of water use from wells that draw from the Arikaree Aquifer on the Pine Ridge Indian Reservation. However, none of these petitioners has demonstrated a concrete and particularized injury from current operations despite nearly 20 years of mining at the site.

Conclusory allegations about potential radiological harm from the facility in general are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251. Judicial and Commission standing jurisprudence requires “realistic threat ... of direct injury.” *Id.* As a result, a standing inquiry includes a threshold, fact-based question as to whether the alleged injury and causation are realistic or even plausible, including an assessment of matters such as the geology of the area, flow direction, and flow rate. Without understanding these basic factors, a Board cannot properly assess whether an alleged injury or causal chain is realistic. This is particularly true where, as here, there is a long history of operations and no evidence of offsite contamination or other alleged “injury.”

Here, the undisputed geologic, hydrologic, and geographic differences between the mining area on one hand and the aquifers used for well water at the Pine Ridge Reservation on the other, undermine any claims of plausible injury or causation. The Basal Chadron (“basal”

means base), the aquifer in which mining occurs, lies above the Pierre Shale, which acts as a lower confining unit. Application, at 2-105, 2-84. A confining unit is a layer of sediment or lithologic unit of low permeability that effectively bounds an aquifer. Above the Basal Chadron lies the Middle Chadron (the upper confining unit), then the Upper/Middle Chadron, then the Upper Chadron (another confining unit). Above the Upper Chadron lies the Brule. The Arikaree Formation, which becomes the High Plains Aquifer (the source of well water at Pine Ridge), is not present at Crow Butte; it does not even begin for several miles to the east of the existing Crow Butte operation.

The horizontal distance between the Basal Chadron at Crow Butte and the Arikaree formation at Pine Ridge is on the order of 30-40 miles and the horizontal flow rate in the Basal Chadron is roughly 10 feet/year. In addition to being distant horizontally, the elevation of the mining unit at Crow Butte is such that an Arikaree well would be several hundred vertical feet above the mining units.¹¹ Thus, contamination would have to travel 30-40 miles horizontally in an aquifer with a flow rate of 10 feet/year and flow several hundred feet vertically through several confining units — all against the natural groundwater flow direction. This is unrealistic and implausible, even before recognizing that such contamination would have to result from an uncontrolled excursion that was not captured by the monitoring wells or contamination that was not remediated. *Compare White Mesa*, 54 NRC at 252-53 (acknowledging mitigation measures in assessing standing). Contrary to established NRC precedent, the Board made no attempt to realistically assess local hydrology, incorrectly concluding that these issues “go to the merits.” LBP-08-24, at 16.

¹¹ The elevation of the withdrawal point from the Arikaree aquifer would be far above the ground surface at Crow Butte. This highlights just one of several unrealistic aspects of the standing claims.

The current circumstances are similar to those in *White Mesa* where the Commission declined to find standing even though the petitioner provided an expert affidavit concerning undetected leakage from the site. The Commission determined that, because the expert failed to establish a mechanism or pathway for contamination of groundwater used by petitioner, the injury and causation were “unfounded conjecture.” *White Mesa*, CLI-01-21, 54 NRC at 253; *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.¹² Here, any injury based on possible groundwater contamination is similarly speculative. Although the Board appears to place great weight on the statements of Hannan LaGarry (LBP-08-24, at 13-15), his statements are nothing more than speculation and conjecture. He does not discuss specific flow paths or show how contamination could possibly move upgradient or across undisputed hydrologic divides.¹³ Based on any realistic assessment of the physical and hydrologic properties of the area, speculative contamination of wells on Pine Ridge is not an “injury-in-fact.”

The Board also erred by reversing the roles of the prospective intervenor and the applicant with respect to standing. According to the Board, neither Crow Butte nor the NRC Staff advanced arguments refuting the plausibility of aquifer contamination at Pine Ridge, which is over 30 miles away. LBP-08-24, at 16. To the contrary, Crow Butte highlighted the substantial body of evidence in the application (which has been confirmed by years of operating history) demonstrating that the contamination pathways posited by petitioners are not plausible.

¹² In *Sequoyah*, the Commission found that petitioners had standing based on injuries due to groundwater contamination. Unlike the instant case and *White Mesa*, the individual standing affidavit in that case was accompanied by an expert declaration from a professional hydrogeologist who examined data regarding flow paths of groundwater in the area and provided examples of flow paths from the site towards the petitioner’s well.

¹³ The Board based a portion of its standing determination on the Presiding Officer’s decision in *Hydro Resources, Inc.* LBP-08-24, at 11-12. Most critically, the Board here erred in ignoring the “reasonably contiguous” aspect of *Hydro Resources*. Drawing water from wells in a different aquifer (that does not even exist at Crow Butte) over 30 miles away is far from “reasonably contiguous.”

Moreover, the Board's formulation turns the standing requirement on its head. A petitioner has an affirmative duty to demonstrate a concrete and particularized interest. Yet, none of the petitioners alleged injuries, causation, or redressibility that meet the minimum showing for standing. For example, Beatrice Long Visitor Holy Dance does not specify the aquifer from which she draws her well water or discuss how her well could be contaminated by Crow Butte, which is roughly 40 miles away. Ms. Long Visitor Holy Dance does not mention groundwater contamination or surface water spills or reference any particular source of contamination. Moreover, her affidavit states only that a *tributary* of the White River flows through her family land (suggesting that she is not actually "downstream").

The Board also found that Joe American Horse, Sr. had standing through claims of water use from the Arikaree aquifer on the Pine Ridge Reservation. Mr. American Horse's affidavit does not include any mention of *how* Crow Butte's activities might cause an injury at that remote location. Where a petitioner fails to establish a mechanism or pathway for contamination of surface or groundwater used by petitioner, the injury and causation are "unfounded conjecture." *White Mesa*, CLI-01-21, 54 NRC at 253.

Debra White Plume states that she draws drinking water from a private well in the Arikaree aquifer, but never describes how this is relevant to Crow Butte's operation. Likewise, she never points to any evidence showing that Crow Butte's operations will cause harm 60 miles away at her residence in South Dakota, which lies in a different hydrogeologic "watershed." Ms. White Plume's implicit claim of contaminated aquifer also contradicts, without providing any basis or support, the substantial data in the application indicating that the Chadron Formation is a different aquifer than the Arikaree Aquifer and that there is no reasonable mechanism for groundwater contamination at Pine Ridge. There is no assessment of possible flow paths that

could potentially permit the transfer of material from Crow Butte's operations to her well.¹⁴ *White Mesa*, 54 NRC at 253. The affidavit itself does not even aver a link between Crow Butte's operations 60 miles away and any actual or threatened injury. At bottom, Ms. White Plume does not specify *where* or *how* Crow Butte's operations could plausibly impact her, nor discuss how any such injury would be redressed in this proceeding.

Loretta Afraid of Bear Cook's alleged injuries are unsubstantiated and speculative. Ms. Afraid of Bear Cook does not allege that she currently uses groundwater from wells. And, even if she was using water from wells on her family land, she does not provide any information regarding the aquifer she uses nor posit any mechanism for contamination that is physically possible, much less plausible. Ms. Afraid of Bear Cook makes no allegations regarding potential release mechanisms; there is no mention of surface water spills or reference to any particular source of contamination. Nothing in her affidavit supports a finding that Crow Butte's operations will "cause" contamination.¹⁵ Ms. Afraid of Bear Cook does not specify the location or frequency of past use of the White River. Most importantly, she does not indicate

¹⁴ Ms. White Plume does not allege any injury related to potential surface water contamination. In LBP-08-06, the Board found that Ms. White Plume had established standing based on specific reference to the White River and fishing in the White River. *See Crow Butte Resources* (License Amendment Application for North Trend Expansion Project), LBP-08-06, __ NRC __, slip op. at 55 (April 29, 2008). In contrast, her affidavit here omits reference to fishing or the White River. The lack of injury is especially glaring as there is no regular discharge to Wounded Knee Creek from Crow Butte's operations and no information regarding the location of the creek.

¹⁵ Ms. Afraid of Bear Cook's allegations are unlike those in *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 184-85 (2000). There, it was "undisputed that ... unlawful conduct – discharging pollutants in excess of permit limits – was occurring at the time the complaint was filed" and nearby residents "curtailed" use of the affected waterway. Here, there are no regular or ongoing discharges into the White River.

any current use of the White River.¹⁶ In order to carry her burden, a petitioner must delineate the frequency and type of contacts. Otherwise, there is insufficient information to support a “concrete” injury. This is especially true where, as here, there is no discharge or source of contamination of the White River from Crow Butte’s operations.

Thomas K. Cook’s affidavit is substantially similar to that of Loretta Afraid of Bear Cook. According to Mr. Cook, there is no ongoing use of the White River or well water from the Arikaree by him or his family. Further, to the extent that standing would be based on the use of well water from the Arikaree aquifer for ceremonial use, Mr. Cook’s affidavit indicates that such use ceased in the mid-1990s when the water pipeline reached the relevant allotment. Cook Aff., at ¶8. Thus, there can be no injury to support standing.

Given the non-specific, unsupported nature of the alleged injuries, the speculative and conjectural nature of causation, and the absence of redressibility, the Board erred in finding standing for the Consolidated Petitioners.

B. The Oglala Sioux Tribe’s Contentions Are Not Admissible

To intervene in a proceeding a petitioner must, in addition to demonstrating standing, submit at least one admissible contention. Failure of a contention to meet any one of the requirements of § 2.309(f)(1) is grounds for its dismissal. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). The Commission has stated that the “contention rule is strict by design,” having been “toughened . . . because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’” *Millstone*, 54 NRC at 358. Nevertheless, the Board has

¹⁶ To the extent her lack of use is based on potential allergic reactions such as those that affected her daughter in the past, there is no basis to conclude that this “injury” is caused by Crow Butte. Crow Butte was not yet in operation when the reactions first occurred.

admitted Environmental Contentions A through E despite fundamental flaws and failure to satisfy the requirements of § 2.309(f)(1).

1. Environmental Contention A Is Inadmissible

It is the responsibility of a petitioner to provide the necessary information to satisfy the requirements for admission of contentions, including an explanation of the bases for its contentions. *Seabrook*, ALAB-942, 32 NRC at 416-417. The petitioner has failed to do so here. The Tribe's proposed contention asserts that "[t]here is no evidence based science for [Crow Butte's] conclusion that ISL mining has 'no non-radiological health impacts' ... or that non-radiological impacts for possible excursions or spills are 'small.'" Petitioners cite to a letter from John Peterson in 1989 and an opinion of Dr. LaGarry regarding potential for contamination of the aquifers at Pine Ridge from Crow Butte's operations. Pet. at 7. However, neither document takes issue with any specific portion of Crow Butte's application. Indeed, the LaGarry opinion is nothing more than an overview of the regional geology. Conclusory statements cannot provide "sufficient" support for a contention, simply because they are made by an expert. *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 472 (2006). This is not the specific statement required by Section 2.309(f)(1) and fails to establish a dispute with the detailed, site-specific investigations¹⁷ performed by Crow Butte that are referenced in the application.

Likewise, Petitioner provides no expert or factual support to call into question the adequacy of Crow Butte's biweekly monitoring program. As the application and experience shows, an undetected excursion is highly unlikely. Application, at 5-29. All wellfields are

¹⁷ Pump tests conducted by Crow Butte indicate no faulting or fracturing that affect the confinement of the Chadron Sandstone or which would affect in-situ mining of the uranium mineralization. Application, at 2-114. Petitioners do not challenge these tests or any other data in the application.

surrounded by a ring of monitor wells located no further than 300 feet from the wellfield and screened in the ore-bearing Chadron aquifer. *Id.* Additionally, monitor wells are placed in the first overlying aquifer above each wellfield segment. *Id.* Sampling of these wells is done on a biweekly basis. Past experience at in-situ leach mining facilities has shown that this monitoring system is effective in detecting leachate migration. *Id.* The total effect of the close proximity of the monitor wells, the low flow rate from the well patterns, and overproduction of leach fluids (production bleed) makes the likelihood of an undetected excursion extremely remote. *Id.* Petitioner provides no basis for asserting that the monitoring plan is inadequate. A contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’” *Fansteel*, CLI-03-13, 58 NRC at 203.

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

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

Application, at 5-107. Although petitioner argues that uranium should also be used as an excursion indicator, neither the petition nor the attached documents argue that use of the parameters selected by Crow Butte are inadequate to detect excursions. Thus, the Board erred in

admitting the contention because the proposed contention wrongly asserts that a matter was not addressed and because it fails to provide any basis for disputing the information that was set forth in the application.

This contention, along with Environmental Contentions C, D, and E, should also be rejected because the Tribe has not demonstrated standing to maintain the contention. *See supra*, Section IV.A.1.

2. *Environmental Contention B Is Inadmissible*

First, the petition fails to take issue with any specific portion of the application. Although the Tribe argues that it must be consulted regarding the significance of the cultural resources identified previously, the Tribe does not assert that the significance of any identified resource was underestimated or ignored. Nor have petitioners argued that operations during the renewal period will adversely impact previously-identified resources. Indeed, the application notes that potentially significant resources “have been avoided,” and that further construction activities “will avoid” these resources. Application, at 7-27. There is simply no specific or genuine dispute with the application. *See* 10 C.F.R. § 2.309(f)(1)(vi).

Second, the petition does not identify any requirement that mandates Crow Butte (as opposed to the NRC) consult with the Tribal Historic Preservation Officer. There is no legal requirement that the *applicant* consult with state or tribal authorities under the NHPA. The requirement to consult applies only to federal agencies such as the NRC. Any challenge based on failure to consult under the NHPA is therefore premature.

3. *Environmental Contention C Is Inadmissible*

This contention mistakenly asserts that Crow Butte “ignores” the potential for an accident to impact the White River. Pet. at 16. To the contrary, Crow Butte has taken

affirmative steps to protect surface water quality in the event of a wellfield accident. In Section 7.4.2.2, Crow Butte explicitly acknowledges the potential to impact surface water quality, and then discusses the measures in place to protect water quality. For example, wellfield areas are installed with dikes or berms to prevent spilled solution from entering surface water features. Application, at 7-9. Process buildings are constructed with secondary containment, and a regular program of inspections and preventive maintenance is in place. *Id.* Crow Butte also discussed measures to protect against contamination of the shallow aquifer (Brule), which is referred to as the “White River alluvium” in the petition, including use of high density polyethylene with butt welded joints and leak testing. *See* Application, at 7-13 to 7-14. If a petitioner submits a contention of omission, but the allegedly missing information is in the license application, then the contention does not raise a genuine issue. *Fla. Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-16, 31 NRC 509, 521 n.12 (1990).

Further, petitioners must show deficiencies in the application and indicate some link between the claimed deficiency and either the health and safety of the public or the environment. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 439-41 (2002). Here, petitioners do not challenge the adequacy of the specific steps that Crow Butte has taken to minimize potential surface water impacts, nor do they show that any impacts were overlooked. Accordingly, the contention fails to establish a genuine dispute with the application and must be rejected.

4. *Environmental Contention D Is Inadmissible*

In Environmental Contention D, the Tribe challenges Crow Butte’s conclusion that various aquifers are not hydrologically interconnected. Although the petitioners assert that “[t]he aquifers do communicate,” they provide no evidence to support this claim. The excerpt

from a report by LaGarry proffered in the petition does not indicate communication among aquifers. Instead, it posits a potential link to the White River, but not to the aquifers used for drinking water in Pine Ridge. In any event, LaGarry does not take issue with any specific portion of Crow Butte’s application. Indeed, as noted previously, the LaGarry opinion is nothing more than an overview of the regional geology. This is no substitute for the detailed, site-specific investigations described in the application, which have been confirmed by nearly 20 years of operation and which are not challenged by petitioners. *See supra*, note 17.

Petitioners also cite to a letter from the Nebraska DEQ based on comments from a *preliminary* review of Crow Butte’s Aquifer Exemption Petition for the North Trend Expansion.¹⁸ Merely pointing to questions of another agency — in an entirely different regulatory context and for a different mining area from the one at issue here — is a far cry from the specificity the contention rule demands. To satisfy the contention rule, petitioners must do more than “rest on [the] mere existence” of open items in staff reviews as a basis for their contention. *Balt. Gas & Elec. Co. (Calvert Cliffs Nuclear Power Plant)*, CLI-98-25, 48 NRC 325, 350 (1998). Analogously, a contention cannot simply be based on comments by a state agency regarding a permitting issue separate from the NRC’s review. At bottom, the proposed contention fails to directly controvert a position in the application and should be rejected. *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 342 (1999).

¹⁸ To the extent that petitioners are implicitly challenging the aquifer exemption issued by the State of Nebraska for the current mining area, the proposed contention is raising an issue outside the scope of this proceeding. Prior to injecting lixiviant into the mining zone, Crow Butte was required to obtain an aquifer exemption under the provisions of the State and Federal UIC regulations. *See, e.g.*, Application, at 10-1.

5. *Environmental Contention E Is Inadmissible*

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

Although the petitioner argues that this violation of a state-issued permit shows that Crow Butte's procedures "demonstrably do *not* protect health," the consent decree notes that Crow Butte was recycling its well development water as a conservation measure and acknowledges that such treatment "did not result in any pollution of either the surface of the ground or any aquifer thereunder." Consent Decree, at ¶2. Moreover, Crow Butte self-discovered the violation and self-reported it to NDEQ. To form the basis for an admissible contention, allegations of improprieties must be of more than historical interest: they must relate directly to the proposed licensing action. *Millstone*, CLI-01-24, 54 NRC at 365. There is no allegation of harm or assertion that this issue, which was not even a violation of the NRC license, will recur, and it therefore cannot serve as a basis for a contention.

Further, the Board apparently interpreted the Tribe's one paragraph basis for its contention as a broad challenge to the management of the facility. LBP-08-24, at 42. However, even if this somehow met the Commission's standards for admitting a contention on management integrity, the Tribe's brief never alleged that Crow Butte management lacked a safety conscious attitude or integrity. A Board should not supply new bases for a contention that

favor the petitioner or supply information that is lacking. *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991). At a minimum, this aspect of the contention should be reversed.

C. The Consolidated Petitioners' Contentions Are Not Admissible

1. *Environmental Contention E Is Inadmissible*

This proposed contention alleges that the cost/benefits discussed in the application fail to include the economic value of wetlands. First, neither the Petitioners (Pet. at 28) nor the Board (LBP-08-24, at 49-52) cite any regulatory or statutory requirement to consider the economic value of wetlands. Second, although the Board appears to base its determination on the value of wetlands that would be impacted by some hypothetical contamination (*id.* at 50), the petition (Pet. at 28) contains no allegation that Crow Butte's activities even impact a specific wetland area or that the application fails to assess the value of any particular wetlands. Moreover, the petition does not discuss how a study involving wetlands in Australia or a global estimate of the value of wetlands has any bearing on the application. In short, petitioners have not established a genuine dispute with the application. There is simply nothing here to litigate.

2. *Technical Contention F Is Inadmissible*

The sole basis for this one-sentence contention is that the Crow Butte does not mention more recent research in its application. Con. Pet. at 30. Yet, there is no regulatory requirement to include "recent research," especially where there is no indication that incorporating new regional research would undermine the comprehensive and detailed site-specific data used by Crow Butte or otherwise change the conclusions in the application. In any event, the application does update information provided in prior license applications at Crow Butte with additional site specific data, noting that "new information from exploratory

drilling/logging activities within the License Area” was used to describe the geology and seismology of the area. Con. Pet. at 30; Application at 2-76.

Rather than articulate a basis for the contention or describe some dispute with the application on a material issue, Petitioners simply refer to the LaGarry opinion without any explanation as to how it raises a dispute with the application. LaGarry does not take issue with any specific portion of Crow Butte’s application. Instead, as noted above, he simply provides an overview of regional geology whose relevance is unclear given the site-specific information provided. Without specifically challenging the application, a contention cannot be admitted.

The Board also discusses comments of Paul Robinson and, in particular, his comments regarding EPA guidance for groundwater quality monitoring. LBP-08-24, at 55. The one-sentence Technical Contention F, however, contains no mention of or reference to Mr. Robinson or groundwater monitoring. Con. Pet. at 30. A Board should not supply new bases for a contention that favor the petitioner or supply information that is lacking. *Palo Verde*, CLI-91-12, 34 NRC at 155.

3. *Miscellaneous Contention G Is Inadmissible*

Miscellaneous Contention G, as admitted by the Board, is limited to a contention of omission, asserting that Crow Butte failed to disclose in its application that it is owned and controlled by a foreign corporation. LBP-08-24, at 67. However, the Crow Butte docket contains correspondence regarding NRC’s approval of Cameco’s purchase of Crow Butte.¹⁹

And, there is no doubt that all parties to the proceeding are familiar with the ownership of Crow

¹⁹ See Ltr. from Stephen Collings, Crow Butte Resources, to Joseph Holonich, Chief, Uranium Recovery Branch, dated May 13, 1998 (Accession No. 9805260014); Ltr. from Joseph Holonich, Chief, Uranium Recovery Branch, to Stephen Collings, Crow Butte Resources, dated June 5, 1998 (Accession No. 9806120319). The NRC determined at that time that no license amendment was required. As a result, the issue cannot now be “bootstrapped” into this limited license renewal proceeding.

Butte. Thus, there is no basis for a contention regarding the ownership of Crow Butte and no genuine dispute within the scope of a license renewal application.

4. *Miscellaneous Contention K Is Inadmissible*

Miscellaneous Contention K alleges that the NRC lacks authority to issue a license to a U.S. corporation that is owned, controlled and dominated by foreign interests. However, there is no statutory prohibition on foreign ownership of a source material license. Section 103d. of the AEA does not prohibit foreign ownership of source material licensees. Petitioners merely point to 10 C.F.R. § 40.38 and state that “a fair reading” of Section 40.38 bars issuance of the license to Crow Butte. Con. Pet. at 38. This is gross misrepresentation of the regulation and one that does not rise to the level of a genuine dispute within the scope of a license renewal application.

Section 40.38 provides that a license “may not be issued to the Corporation, if the Commission determines that: (A) The Corporation is owned, controlled or dominated by . . . a foreign corporation.” “Corporation” means “the United States Enrichment Corporation (USEC), or its successor.” 10 C.F.R. § 40.4. Those provisions were added to implement the statutory changes associated with the USEC Privatization Act. The language in 10 C.F.R. § 40.38 conforms to legislation that restricted issuance of a certificate/license to USEC if issuance would be inimical to a reliable and domestic source of *enrichment* services. 62 Fed. Reg. 6664, 6665 (Feb. 12, 1997). Thus, by its plain language, 10 C.F.R. § 40.38 does not apply to Crow Butte.

The Board also erred in expanding the scope of the contention. As the Board interprets it, if there is no prohibition on foreign ownership, then the Board is “called upon to determine whether issuance or renewal of a source materials license would be inimical the U.S. national interest and the common defense and security.” LBP-08-24, at 73. However, the

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES' BRIEF IN SUPPORT OF APPEAL FROM LBP-08-24" in the captioned proceeding have been served on the following persons via the Electronic Information Exchange this 1st day of December 2008.

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