

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

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NRC STAFF'S NOTICE OF APPEAL OF LBP-08-024, LICENSING  
BOARD'S ORDER OF NOVEMBER 21, 2008, AND ACCOMPANYING BRIEF

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December 10, 2008

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(License Renewal for the In Situ Leach	)	
Facility, Crawford, Nebraska)	)	ASLBP No. 08-867-08-OLA-BD01

NRC STAFF'S NOTICE OF APPEAL OF LBP-08-24, LICENSING BOARD'S ORDER OF NOVEMBER 21, 2008, AND ACCOMPANYING BRIEF

INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(a) and (c), the NRC staff ("Staff") hereby proffers its Notice of Appeal, with accompanying brief, of the Atomic Safety and Licensing Board's ("Board") Memorandum and Order of November 21, 2008.<sup>1</sup> The Board therein, *inter alia*, (1) granted the petition for intervention and request for hearing of the Oglala Sioux Tribe ("Tribe") and (2) granted, in part, the petition for intervention and request for hearing of the Consolidated Petitioners.<sup>2</sup> The Staff avers that the petitioners' hearing requests should have been wholly denied. For the reasons detailed herein, the Commission should reverse LBP-08-24 and terminate the proceeding.

BACKGROUND

Crow Butte Resources, Inc. ("CBR" or "Applicant") is licensed to operate an in-situ

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<sup>1</sup> Memorandum and Order (Ruling on Hearing Requests), LBP-08-24, 67 NRC \_\_\_\_ (Nov. 21, 2008) (slip op.) ("LBP-08-24" or "Order").

<sup>2</sup> The Consolidated Petitioners include Beatrice Long Visitor Holy Dance, Joe American Horse, Sr., Debra White Plume, Loretta Afraid of Bear Cook, Thomas Kanatakeniate 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.

leach (“ISL”) recovery facility in Crawford, Dawes County, Nebraska.<sup>3</sup> On November 27, 2007, CBR sent by letter to the NRC a license amendment application (“LRA” or “Application”) (ADAMS ML073480266 & ML073480267), requesting renewal of its source materials license for a 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.<sup>4</sup> On May 27, 2008, a notice of opportunity to request a hearing or petition to intervene was published in the Federal Register.<sup>5</sup>

On July 28, 2008, the Tribe, the Consolidated Petitioners, and the Delegation timely filed petitions for intervention and requests for hearing.<sup>6</sup> Responses to the three petitions were filed by the Applicant on August 22, 2008,<sup>7</sup> and, shortly thereafter, the Staff filed the same.<sup>8</sup> On September 3, 2008, the Tribe, the Consolidated Petitioners, and the Delegation

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<sup>3</sup> CBR currently possesses source material license, SUA-1534.

<sup>4</sup> Letter from William von Till to Stephen P. Collings (dated March 28, 2008) (ML080720341).

<sup>5</sup> Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, 73 Fed. Reg. 30,426 (May 27, 2008).

<sup>6</sup> Request for Hearing and/or Petition to Intervene (July 28, 2008) (“Tribe’s Petition”); Consolidated Request for Hearing and Petition for Leave to Intervene (July 28, 2008) (“Consolidated Petitioners’ Petition”); Request for Hearing and Petition for Leave to Intervene (July 28, 2008).

<sup>7</sup> Applicant’s Response to Petition to Intervene Filed by Oglala Sioux Tribe (Aug. 22, 2008); Applicant’s Response to Petition to Intervene filed by Consolidated Petitioners (Aug. 22, 2008); Applicant’s Response to Petition to Intervene Filed by Oglala Delegation of the Great Sioux Nation Treaty Council (Aug. 22, 2008).

<sup>8</sup> NRC Staff’s Response in Opposition to Petitioner’s Request for Hearing and/or to Intervene of the Oglala Sioux Tribe (Aug. 25, 2008) (“Staff’s Response to the Tribe”); 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 (Aug. 25, 2008) (“Staff’s Response to the Consolidated Petitioners”); NRC Staff’s Response in Opposition to Petitioner’s Request for Hearing and/or to Intervene of the Delegation of the Great Oglala Sioux Nation Treaty Council (Aug. 25, 2008).

filed their replies to the Applicant's and to the Staff's responses.<sup>9</sup> On September 30 and October 1, 2008, oral argument was held in Crawford, NE.

On November 21, 2008, the Board issued its decision. The Board found the Tribe to have standing and admitted all five of its proffered contentions.<sup>10</sup> The Board found certain members of the Consolidated Petitioners to have demonstrated standing to participate as parties and admitted Consolidated Petitioners' Environmental Contention E and Technical Contention F.<sup>11</sup> The Board also admitted in part Consolidated Petitioners' Miscellaneous Contentions G and K.<sup>12</sup> While the Board did not find that the Delegation had demonstrated standing to participate as a party, the Board granted the Delegation the opportunity to participate as an interested governmental body pursuant to 10 C.F.R. § 2.315(c).<sup>13</sup>

#### ARGUMENT

The Board committed several errors in its decision to grant the petition for intervention and request for hearing of the Tribe and to grant, in part, the petition for intervention and request for hearing of the Consolidated Petitioners. The Board erred in several respects in granting standing to the Tribe and, in part, to the Consolidated Petitioners.

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<sup>9</sup> Oglala Sioux Tribe's Reply to Applicant's Response to Petition to Intervene filed by Oglala Sioux Tribe (Sept. 3, 2008); Oglala Sioux Tribe's Reply to NRC Staff's Response to Petition to Intervene Filed by Oglala Sioux Tribe (Sept. 3, 2008); Petitioners' Consolidated Reply to Applicant and NRC Staff Answers to Consolidated Petition to Intervene (Sept. 3, 2008) ("Consolidated Petitioners' Reply"); Petitioner Oglala Delegation of the Great Sioux Nation Treaty Council's Reply to Applicant and NRC Answers to Petition for Leave to Intervene (Sept. 3, 2008) ("Delegation's Reply"). In its reply, the Delegation additionally sought to join the contentions proffered by the Consolidated Petitioners. Delegation's Reply at 3.

<sup>10</sup> Order at 82.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 82-83.

<sup>13</sup> *Id.* at 82.

I. Failure of the Petitioners to Demonstrate Standing.

A. General Requirements for a 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.<sup>14</sup> In making that demonstration, a petitioner must address the factors of 10 C.F.R. § 2.309(d)(1).

To determine whether a petitioner has established the requisite interest to show standing under the Commission's regulations, the Commission has consistently directed licensing boards to apply, as guidance, contemporary judicial concepts of standing.<sup>15</sup> Thus, "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."<sup>16</sup> The alleged injury may be actual or threatened,<sup>17</sup> but it cannot be "conjectural" or "hypothetical,"<sup>18</sup> nor can the threat of injury be too speculative.<sup>19</sup> Additionally, the injury alleged by a petitioner must lie within the "zone of interests" protected by the statutes governing the proceeding.<sup>20</sup>

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<sup>14</sup> 10 C.F.R. § 2.309(a).

<sup>15</sup> The Board asserts that "federal agencies are neither constrained by Article III nor governed by judicially created standing doctrines." Order at 8 n.32. The Commission, however, expects the boards to apply judicial concepts of standing. See e.g., *Yankee Atomic Elec. Co.*, CLI-98-21, 48 NRC 185, 195 ("When determining whether a petitioner has established the necessary 'interest' ... 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)).

<sup>16</sup> *Id.* (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-04 (1998)).

<sup>17</sup> *Id.* (citing *Wilderness Soc'y v. Griles*, 824 F.2d 4, 11 (D.C.Cir. 1987)).

<sup>18</sup> *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)).

<sup>19</sup> *Id.* at 72 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983)).

<sup>20</sup> *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.").

A petitioner has the burden to establish a “causal link” between the alleged injury and the challenged action.<sup>21</sup> 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.”<sup>22</sup> 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.”<sup>23</sup>

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.”<sup>24</sup> An organization attempting to assert standing on its own behalf (“organizational” standing) “must demonstrate a palpable injury in fact to its organizational interests that is within the zone of interests protected by the AEA or NEPA.”<sup>25</sup> 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.”<sup>26</sup>

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<sup>21</sup> See *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998).

<sup>22</sup> *Id.* (quoting *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75).

<sup>23</sup> *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)).

<sup>24</sup> *G.I.T.*, CLI-95-12, 42 NRC at 115.

<sup>25</sup> *Hydro Resources, Inc.* (“HRI”) (2929 Coors Road, Suite 101, Albuquerque, NM 87120), LBP-98-9, 47 NRC 261, 271 (1998).

<sup>26</sup> *N. States Power Co.* (Monticello; Prairie Island, Units 1 & 2; Prairie Island ISFSI) CLI-00-14, 52 NRC 27, 47 (2000).

B. The Board Should Have Rejected the Consolidated Petitioners' Claims of Standing.

As the Board states, “[o]ne basis on which many of the petitioners here seek to establish standing is the possibility that contaminants from Crow Butte’s licensed ISL uranium mining site ... either have contaminated, or will contaminate, the aquifer from which many of the petitioners obtain their water.”<sup>27</sup> The Board begins its analysis of this basis with the holding in *Hydro Resources, Inc.* (“*HRI*”), since the Board views *HRI* as the one proceeding in which the Commission has addressed standing in ISL mining cases. The Atomic Safety and Licensing Board in *HRI* held that, for the involved petitioners, “anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites have suffered an ‘injury in fact.’”<sup>28</sup> Based on this holding, the Board concludes that “to the extent contaminants can plausibly migrate to the aquifer from which a petitioner obtains his or her water, a petitioner would have a claim of a cognizable injury and could be accorded standing.”<sup>29</sup>

In attempting to apply the holding in *HRI*, the Board confronts the fact that “no petitioner ... claims to reside, or own property, immediately contiguous to an ISL injection or processing well.”<sup>30</sup> The Board notes, however, that all of the petitioners argue that due to potential hydrogeologic interconnectivity between the aquifer being mined and other aquifers used by the Consolidated Petitioners for drinking and other purposes, contaminants from CBR’s facility site are “flowing into pathways to human ingestion.”<sup>31</sup>

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<sup>27</sup> Order at 11.

<sup>28</sup> *HRI*, LBP-98-9, 47 NRC at 275.

<sup>29</sup> Order at 12.

<sup>30</sup> *Id.* (citing Consolidated Petitioners’ Reply at 10).

<sup>31</sup> *Id.* (quoting Consolidated Petitioners’ Reply at 10).

The Board posits that it “has before it a number of expert opinions alleging a sufficient link to find the requisite standing at more considerable distances than what was found in the Amendment proceeding.”<sup>32</sup> As a principal example, the Board points to the expert opinion of Hannan LaGarry, Ph.D., who argues “that the ‘layer cake’ concept applied to the local geology by the 1990s researchers, and relied on by Crow Butte, is incorrect and overestimates the thickness and areal extent of many units by a factor of 40 to 60 percent.”<sup>33</sup> Dr. LaGarry posits that “[s]econdary porosity, in the form of intersecting faults and joints, is common in northwestern Nebraska, especially along the Pine Ridge Escarpment.”<sup>34</sup> According to Dr. LaGarry, “[t]hese faults and fractures transect all bedrock units” and “could potentially connect to the uranium-bearing Chamberlain Pass Formation to modern river alluvium, and connect the uranium-bearing Chamberlain Pass Formation to the overlying secondary porosity of the Brule Formation.”<sup>35</sup> Thus, in brief, Dr. LaGarry argues that “[t]here are two principal pathways through which contaminated water could migrate away from Crow Butte Resources well fields and into adjacent areas: 1) along the White River alluvium (modern river alluvium); and 2) along faults.”<sup>36</sup>

In response to the expert opinion offered by Dr. LaGarry, the Staff argued that nothing Dr. LaGarry alleges manifests a plausible chain of causation.<sup>37</sup> Dr. LaGarry argues

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<sup>32</sup> *Id.* at 13. Aside from the opinion offered by Hannan LaGarry, Ph.D., the Board does not refer in the course of its analysis on standing to any other expert opinions.

<sup>33</sup> *Id.* (citing Expert Opinion Regarding ISL Mining in Dawes County, Nebraska (Hannan E. LaGarry, Ph.D.) at 3 (“LaGarry”).

<sup>34</sup> LaGarry at 3.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> In furtherance of the Staff’s argument, the Staff identified the following deficiencies in the Consolidated Petitioners’ proffered chain of causation: (1) Dr. LaGarry does not identify exactly what (continued. . .)

merely that due to faults “potentially connect[ing] the uranium-bearing Chamberlain Pass Formation to the overlying secondary porosity of the Brule formation,” contaminated water “could migrate away from Crow Butte Resources well fields and into adjacent areas.”<sup>38</sup> The Board also notes that Dr. LaGarry opined that “such uranium may lie within the faults themselves”<sup>39</sup> and, further, notes that contaminated groundwater “may travel through pathways of faults and joints and affect ... petitioners at the Pine Ridge Indian Reservation.”<sup>40</sup> Support for these assertions is lacking.

In response to the Staff’s assertions, the Board holds that “factual arguments over such matters as the geological makeup of the area, the direction of flow, and the time required for water to flow a certain distance, go to the merits of the case,”<sup>41</sup> and “a licensing board’s review of a petition for standing is to ‘avoid the familiar trap of confusing the standing determination with the assessment of a petitioner’s case on the merits.’”<sup>42</sup> While “recognizing that the distances from Crow Butte’s mining site to many of the petitioners’ residences are considerable,” the Board, nonetheless, finds that the Staff did not advance any arguments

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(. . .continued)

constitutes “contaminants” in his written position (Staff’s Response to the Tribe at 18); (2) Dr. LaGarry does not address “the occurrence, characteristics, and direction of hydraulic flow between the water bodies” (*Id.* at 18-19); (3) Dr. LaGarry’s opinion neither refutes nor references any information included as part of CBR’s LRA (Staff’s Response to the Consolidated Petitioners at 40); and (4) Dr. LaGarry makes no attempt to dispute the data and other information the Applicant included as part of its LRA to support its conclusion that the mining aquifer is hydrologically isolated (Transcript at 315:10-25).

<sup>38</sup> LaGarry at 3.

<sup>39</sup> Order at 14 (citing LaGarry at 4).

<sup>40</sup> *Id.* at 16.

<sup>41</sup> Order at 16 (*citing Crow Butte Res., Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-06, 66 NRC at \_\_ (May 21, 2008) (slip op. at 40-41)).

<sup>42</sup> *Id.* (*quoting HRI*, LBP-98-9, 47 NRC at 272 (*citing Sequoyah Fuels Corps.* (Gore, Oklahoma Site Decontamination and Decommissioning Funding), LBP-94-5, 39 NRC 54 (1995))).

“refuting the plausibility that potential groundwater contamination from the Crow Butte mining site may travel through pathways of faults and joints and affect private wells at greater distances from the Crow Butte mining site, including petitioners at the Pine Ridge Indian Reservation.”<sup>43</sup> The Board states that “[p]etitioners are not required to demonstrate their asserted injury with ‘certainty,’ nor to ‘provide extensive technical studies’ in support of their standing argument,”<sup>44</sup> and, as such, the Board “decline[s] to burden the petitioners, at this preliminary stage with the need to conduct extensive technical studies that may be required to meet their burden at hearing.”<sup>45</sup>

The Board concludes that because “petitioners have demonstrated that some level of interconnection between aquifers is plausible,” the Board grants standing “to those petitioners with claims based on the use of well water for domestic or other related purposes (i.e., gardening, ranching, and other agrarian uses).”<sup>46</sup>

Regarding this legal analysis and conclusions of the Board as to the standing of the Consolidated Petitioners, the Board commits the following legal errors: (1) the Board improperly formulates its own bases to enhance the sufficiency of the Consolidated Petitioners’ standing argument; (2) the Board misapplies the holding in *HRI*; (3) the Board improperly places the burden upon the Staff and the Applicant to demonstrate that the chain of causation upon which Consolidated Petitioners’ rely is not plausible, as opposed to placing the burden on the Petitioners to affirmatively demonstrate plausibility; (4) the Board improperly broadens the standard for demonstrating the plausibility of causation, such that

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (citing *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 31 (1999) (citing *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72)).

<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.*

the Consolidated Petitioners need not even address information in the LRA that is contrary to their assertions as to hydrogeologic interconnectivity; and (5) the Board improperly relies upon affidavits submitted in another proceeding to demonstrate that the affiants approve of an organization representing their interests in the current proceeding. Each of these errors is discussed in turn.

First, it is the burden of a petitioner to “set forth a clear and coherent argument”<sup>47</sup> and show “specific and plausible means” of how proposed licensed activities will injure petitioner’s interests.<sup>48</sup> While the Board claims that the Consolidated Petitioners have satisfied this burden, the Consolidated Petitioners have not themselves set forth a clear and coherent argument for standing. Nowhere in their petition is it claimed by the Consolidated Petitioners that “[d]ue to inter-connections between the aquifer being mined ([Basal] Chadron) and other aquifers being used for drinking and other purposes’ ... contaminants from Crow Butte’s mining site are ‘flowing into pathways to human ingestion’ where petitioners reside.”<sup>49</sup> Rather, this statement only appears in the Consolidated Petitioners’ reply.<sup>50</sup> Nowhere in their petition or their reply do the Consolidated Petitioners discuss the expert opinion of Dr. LaGarry or otherwise make any attempt to relate Dr. LaGarry’s opinion to their standing argument.<sup>51</sup> While a Board must construe a petition for intervention in the light most

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<sup>47</sup> *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194 (1999); see also 10 C.F.R. § 2.309(d)(1).

<sup>48</sup> See *PPL Susquehanna, LLC* (Susquehanna Steam Elec. Station, Units 1 and 2), LBP-07-10, 66 NRC 1, 17 (2007).

<sup>49</sup> See Order at 12.

<sup>50</sup> Consolidated Petitioners’ Reply at 10; see *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station, LBP-06-20, 64 NRC 131, 182, 198-99 (2006) (Board did not permit the introduction of new argument in petitioner’s reply.).

<sup>51</sup> See Order at 13-14.

favorable to the petitioner with regards to standing,<sup>52</sup> a Board cannot rely upon statements and allegations not actually made by a petitioner in support of standing, as it is the burden of a petitioner to establish standing.<sup>53</sup>

The Board misapplies the holding in *HRI*. The Atomic Safety and Licensing Board in *HRI* held that, for the involved petitioners, “anyone who uses a substantial quantity of water personally or for livestock from a source that is reasonably contiguous to either the injection or processing sites have suffered an ‘injury in fact.’”<sup>54</sup> The Board’s interpretation of the holding in *HRI* fails to take into account a critical element of that holding—that the source of such water is reasonably contiguous to either an injection or processing site.<sup>55</sup> Since the Consolidated Petitioners do not allege that the source of such water is reasonably contiguous to the operations of the CBR facility, the *HRI* holding is simply not applicable. Furthermore, the hydrogeologic distances contemplated by the Atomic Safety and Licensing Board in *HRI* are significantly shorter than the distances regarding the Consolidated Petitioners.<sup>56</sup> In *HRI*, one of the admitted petitioners lived and used water from a source one half of a mile from the facility source; with respect to Crow Butte, for example, the source of water at the Slim Buttes Indian Reservation is some forty miles away.<sup>57</sup>

The Board improperly places the burden upon the Staff and the Applicant to demonstrate that the chain of causation upon which Consolidated Petitioners’ rely is not

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<sup>52</sup> See *G.I.T.*, CLI-95-12, 42 NRC at 115 (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th.Cir. 1995)).

<sup>53</sup> See *Susquehanna*, LBP-07-10, 66 NRC at 15-16 (citing *Babcock & Wilcox Co. (Apollo, Pennsylvania Fuel Fabrication Facility)*, LBP-93-4, 37 NRC 72, 81 (1993)).

<sup>54</sup> *HRI*, LBP-98-9, 47 NRC at 275.

<sup>55</sup> See *id.*

<sup>56</sup> *Id.* at 275-77; see Transcript at 25:5 – 26:24.

<sup>57</sup> *HRI*, LBP-98-9, 47 NRC at 276-77; see Transcript at 25:2-6.

plausible, as opposed to placing the burden on the Petitioners to affirmatively demonstrate that it is plausible. The Board finds that the Staff had not advanced any “arguments refuting the plausibility that potential groundwater contamination from the Crow Butte mining site may travel through pathways of faults and joints and affect private wells at greater distances from the Crow Butte mining site.”<sup>58</sup> As has been previously noted, it is the affirmative burden of a petitioner to demonstrate a “plausible chain of causation” between the alleged injury-in-fact and the proposed licensed activities.<sup>59</sup> As the Consolidated Petitioners carry the affirmative burden to establish plausibility, the Staff need only demonstrate that the Consolidated Petitioners have not made that showing.

The Board improperly broadens the standard for demonstrating the plausibility of causation, such that the Consolidated Petitioners need not even address information in the LRA that contradicts their assertions as to hydrogeologic interconnectivity. While a determination that the alleged injury “is fairly traceable to the challenged action ... does not depend on whether the cause of this injury flows directly from the challenged action, but whether the chain of causation is plausible,”<sup>60</sup> the Commission has, nonetheless, required that there be a “realistic threat ... of direct injury.”<sup>61</sup> In determining whether a threat is realistic or not, the Commission has considered it appropriate to evaluate the likelihood of the injury’s occurrence, taking into account factors which mitigate the likelihood of the injury

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<sup>58</sup> Order at 16.

<sup>59</sup> See *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311-12 (2005) (“Where there is no ‘obvious’ potential for radiological harm at a particular distance frequented by a petitioner, it becomes the petitioner’s ‘burden to show a specific and plausible means’ of how the challenged action may harm him or her.”); 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, 581 (2005).

<sup>60</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

<sup>61</sup> *Int’l Uranium (USA) Corp. (White Mesa Uranium Mill)*, CLI-01-21, 54 NRC 247, 253 (2001) (*quoting Sequoyah Fuels*, CLI-94-12, 40 NRC at 74).

occurring.<sup>62</sup> For example, in *Int'l Uranium Corp.*, the Commission considered that the Board properly found that the design of the facility would make the contamination alleged by the petitioner unlikely and that the Board's finding was appropriate in determining the plausibility of the threat of the injury alleged by the petitioner.<sup>63</sup>

In the current proceeding, the Board rejected the Staff's arguments regarding the lack of certain information in Dr. LaGarry's expert opinion, such as the nature of the contaminants, the direction of the flow, and the rate of hydrogeologic flow in the area, because such matters "go to the merits of the case"<sup>64</sup> as it is the obligation of the Board to "avoid 'the familiar trap of confusing the standing determination with the assessment of a petitioner's case on the merits.'"<sup>65</sup> This constitutes error by the Board because the absence of such information in Dr. LaGarry's opinion is indispensable to evaluate the likelihood that the injury alleged by the Consolidated Petitioners will occur. The Board should not have accepted Consolidated Petitioners' claims of causation that fail to demonstrate specific and plausible means of how the proposed license renewal will bring about injury. The Consolidated Petitioners are at least required to take a position on such matters in order to "outline a pathway or mechanism" for the transport of contaminants from the CBR site to the sources of their water.<sup>66</sup>

The Board improperly relies upon affidavits submitted in another proceeding to demonstrate that the affiants approve of an organization representing their interests in the

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<sup>62</sup> Compare *id.* at 252-53 with *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

<sup>63</sup> See *id.*

<sup>64</sup> Order at 16 (*citing Crow Butte*, LBP-08-06, 66 NRC at \_\_\_ (slip op. at 40-41)).

<sup>65</sup> *Id.* (*quoting HRI*, LBP-98-9, 47 NRC at 272).

<sup>66</sup> See *Int'l Uranium*, CLI-01-21, 54 NRC at 252-53.

current proceeding. One of the requirements for an organization to assert representational standing is that the organization must show that it is authorized to request a hearing on the member's behalf who is affected by the licensing action.<sup>67</sup> Based on affidavits submitted in the Crow Butte North Trend proceeding, "the Board grants representational standing to Owe Aku and WNRC through individuals Dr. Francis E. Anders and David Alan House, respectively."<sup>68</sup> The affidavits of Dr. Francis E. Anders and David Alan House authorize each of their respective organizations to represent them in the related North Trend proceeding, but the affidavits say nothing about the instant proceeding.<sup>69</sup> Thus, as it stands, there has been no affirmation on the record in this proceeding that Dr. Anders and Mr. House authorize their respective organizations to represent them in this proceeding. Thus, the Board erred by granting standing to Owe Aku and WNRC on a representation basis without any showing that such organizations are authorized to represent members found to be affected by this licensing proceeding.<sup>70</sup>

C. The Board Erred in Granting Standing with Respect to the Tribe.

With regard to the standing of the Tribe, the Board focuses its analysis on what it perceives to be the Tribe's interest in the proper identification and protection of cultural

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<sup>67</sup> *E.g., Consumers Energy Co., Nuclear Management Co., LLC, Entergy Nuclear Palisades, LLC, and Entergy Nuclear Operations, Inc.* (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 409-10 (2007).

<sup>68</sup> Order at 17-18.

<sup>69</sup> See Crow Butte Resources, Inc.; Establishment of Atomic Safety and Licensing Board, 72 Fed. Reg. 71,448 (Dec. 17, 2007); Affidavit of David Alan House Executed on January 10, 2008, at \*2 (ML080240299); Affidavit of Dr. Francis E. Anders Executed on December 28, 2007, at \*1 (ML080080289).

<sup>70</sup> See *Palisades*, CLI-07-18, 65 NRC at 409-10 ("[W]ithout written authorization for such representation, we would have no 'concrete indication that, in fact, the member wishes to have [the organization represent its interests].") (*quoting Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 396 (1979)).

artifacts found on land formally occupied by the Lakota people. According to the Board, the Tribe's injury is clear:

there are cultural resources on the Crow Butte site that have not been properly identified and may be harmed as a result of mining activities. Without consultation of the Tribe, culturally significant resources will go unidentified and unprotected. As a result, development or use of the land might cause damage to these cultural resources, thereby injuring the protected interests of the Tribe.<sup>71</sup>

The Board is of the view that the NRC, contrary to its statutory obligation to consult with the Tribe regarding cultural resources at the CBR site, has failed to do so for at least the past thirteen years. The Board states that for that duration the Staff has made no valid attempt to contact the Tribe about identified cultural resources at the CBR site. Despite the Staff's assurance that it would uphold its statutory obligation by inviting the Tribe to participate in consultation on identified cultural resources at the CBR site as part of its NEPA review for the pending license renewal,<sup>72</sup> the Board finds "such assurances are no substitute for enabling the Tribe to prosecute its contention here,"<sup>73</sup> and, furthermore, the Board quotes the Staff as saying that the required Section 106 evaluation process had not even begun.<sup>74</sup> Thus, the Board holds that the "Tribe's threatened injury is ... within the zone of interests protected by

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<sup>71</sup> Order at 24.

<sup>72</sup> See Transcript at 365:5-12. Section 106 of the National Historic Preservation Act ("NHPA") (16 U.S.C. § 470 *et. seq.*) 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." *Id.* at § 470f (2008). 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. 36 C.F.R. § 800.2(c)(2)(ii). The NRC must ensure that consultation in the Section 106 evaluation process provides an interested tribe "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 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." *Id.* at § 800.2(c)(2)(ii)(A).

<sup>73</sup> Order at 31.

<sup>74</sup> *Id.* (quoting Staff's Response to Tribe at 22).

the NHPA, and is beyond cavil that the failure of consultation provides a definite and concrete threat of injury to the interests of the Tribe, and so the Tribe is accorded standing here.”<sup>75</sup>

The Board erred in granting standing to the Tribe for the following reasons: (1) the matter raised by the Tribe is not ripe because the Staff is not required at this time to conduct a consultation with the Tribe; (2) the Tribe does not make the above argument as part of its basis for standing in its petition; and (3) alleged violations of the consultation requirement of the NHPA associated with prior Commission-approved licensing actions are not cognizable as an injury-in-fact in the pending proceeding because they do not flow from the proposed licensing action. Each of these reasons is discussed in turn.

As part of its responsibilities under the NHPA, the NRC must consult, before the issuance of the subject renewal license, with any Indian tribes which “attach[] religious and cultural significance to historic properties that may be affected” by the issuance of the renewal license.<sup>76</sup> Furthermore, the Commission has directed the Staff that “[t]o the extent practicable, environmental impact statements will be prepared concurrently or integrated with ... related surveys and studies required by other Federal law.”<sup>77</sup> Thus, the Staff is not at this time required to consult with the Tribe and, therefore, this matter is not ripe.

As has been noted above, it is the burden of a petitioner to “set forth a clear and coherent argument”<sup>78</sup> and show “specific and plausible means” of how proposed licensed

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<sup>75</sup> *Id.* at 24-25.

<sup>76</sup> 36 C.F.R. § 800.2(c)(2)(ii).

<sup>77</sup> 10 C.F.R. § 51.70(a).

<sup>78</sup> *Commonwealth Edison Co.*, CLI-99-4, 49 NRC at 194; see also 10 C.F.R. § 2.309(d)(1).

activities will injure petitioner's interests.<sup>79</sup> While the Board claims that the Tribe has satisfied this burden with regard to its alleged violations of the consultation requirement of the NHPA, it is only by the Board's own formulation of a standing argument that the Consolidated Petitioners can be said to have articulated a clear and coherent argument for standing. Nowhere in the Tribe's petition is it argued that the Tribe should be granted standing based on what it perceives to be violations of the NHPA.<sup>80</sup> Nowhere in the Tribe's petition is it alleged, as the Board concluded, "that, for years, the NRC Staff has failed to fulfill its clear statutory obligation to consult with the Tribe regarding the cultural resources that Crow Butte itself has acknowledged encountering on its mining site."<sup>81</sup> The Tribe instead focused its standing argument on impacts associated with "the ability of the Tribe and its members to use its water resources."<sup>82</sup> While a Board must construe a petition for intervention in the light most favorable to the petitioner with regards to standing,<sup>83</sup> a Board cannot rely upon statements and allegations not actually made by a petitioner in support of standing, as it is the burden of a petitioner to establish standing.<sup>84</sup>

Alleged violations of the consultation requirement of the NHPA associated with prior Commission-approved licensing actions are not cognizable as an injury-in-fact in the pending proceeding because they do not flow from the proposed action—the renewal of the facility's

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<sup>79</sup> See *Susquehanna*, LBP-07-10, 66 NRC at 17.

<sup>80</sup> See Order at 22-25.

<sup>81</sup> *Id.* at 24.

<sup>82</sup> Tribe's Petition at 6.

<sup>83</sup> See *G.I.T.*, CLI-95-12, 42 NRC at 115 (citing *Kelley v. Selin*, 42 F.3d 1501, 1508 (6th Cir. 1995)).

<sup>84</sup> See *Susquehanna*, LBP-07-10, 66 NRC at 15-16 (2007) (citing *Babcock & Wilcox Co.*, LBP-93-4, 37 NRC at 81).

license.<sup>85</sup> The focus of this proceeding is instead upon “the application for a license amendment regarding renewal of Source Materials License No. SUA-1534 issued to Crow Butte Resources for its ISL uranium recovery facility in Crawford, Nebraska.”<sup>86</sup>

II. The Board Erred in Admitting Environmental Contentions A, B, C, D, and E of the Tribe and Environmental Contention E, Technical Contention F, and Miscellaneous Contentions G and K of the Consolidated Petitioners.

A. Legal Standards for Contention Admissibility.

In addition to a showing 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).<sup>87</sup> Additionally, a contention must be within the scope of the proceeding as defined by the notice of hearing in order to be admissible.<sup>88</sup> The contention rule is “strict by design.”<sup>89</sup> 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.”<sup>90</sup> The Commission does not permit the “filing of vague, unparticularized contention[s],’ unsupported by affidavit, expert, or

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<sup>85</sup> See Notice of Opportunity for Hearing, Crow Butte Resources, Inc., Crawford, NE, In Situ Leach Recovery Facility, 73 Fed. Reg. 30,426, (May 27, 2008); see also *USEC, Inc.* (American Centrifuge Plant), CLI-06-9, 63 N.R.C. 433, 446 (2006) (“We agree with the Board that reconsideration of that project's compliance with the NHPA is outside the scope of this proceeding.”).

<sup>86</sup> Notice of Opportunity for Hearing, 73 Fed. Reg. at 30,426.

<sup>87</sup> See 10 C.F.R. § 2.309(a).

<sup>88</sup> See *Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-00-23, 52 NRC 327, 329 (2000).

<sup>89</sup> See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

<sup>90</sup> Changes to Adjudicatory Process, 69 Fed. Reg. at 2,182, 2,189-90 (Jan. 14, 2004).

documentary support.”<sup>91</sup> A petitioner may not rely on mere speculation nor base allegations as support for the admission of a proffered contention.<sup>92</sup> 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.<sup>93</sup> Similarly, a petitioner must provide sufficient explanation as to the significance of materials and documents referenced to support of the contention.<sup>94</sup>

B. The Board Erred in Admitting the Tribe’s Env. Contentions A, C, and D.

The Tribe proposed the following as 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).<sup>95</sup>

The Tribe proposed the following as 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.<sup>96</sup>

The Tribe proposed the following as 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.<sup>97</sup>

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<sup>91</sup> *N. Alt. 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)).

<sup>92</sup> *See Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

<sup>93</sup> *See Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), LBP-95-6, 41 NRC 281, 305 (1995).

<sup>94</sup> *See Fansteel, Inc.*, CLI-03-13, 58 NRC at 204.

<sup>95</sup> Tribe’s Petition at 6.

<sup>96</sup> *Id.* at 16.

<sup>97</sup> *Id.* at 18.

The Board relies in admitting each of the contentions on the expert opinion of Dr. LaGarry.<sup>98</sup> The expert opinion of Dr. LaGarry, however, does not provide an adequate basis to support the foregoing question. Each contention is legally insufficient per the factors of 10 C.F.R. § 2.309(f)(1), as each is not alleged with sufficient specificity,<sup>99</sup> is not supported with sufficient explanation,<sup>100</sup> and is not based on a genuine dispute with information contained in the LRA.<sup>101</sup> Specifically, the expert opinion of Dr. LaGarry is materially deficient in several respects: (1) in his written, position, Dr. LaGarry does not identify exactly what constitutes “contaminants”<sup>102</sup>; (2) Dr. LaGarry does not address “the occurrence, characteristics, and direction of hydraulic flow between the water bodies”<sup>103</sup>; (3) Dr. LaGarry’s opinion neither refutes nor addresses any information included as part of CBR’s LRA<sup>104</sup>; and (4) Dr. LaGarry does not controvert, or even address, the data and other information the Applicant included as part of its LRA to support its conclusion that the mining aquifer is hydrologically isolated.<sup>105</sup> Since each contention hinges largely upon the expert opinion of Dr. LaGarry, the foregoing deficiencies in his opinion invalidate other issues raised by the Tribe. For example, the Tribe’s argument in Environmental Contention A, that monitoring wells are not tested with enough frequency to detect excursions outside of the mining area to other aquifers, is

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<sup>98</sup> See Order at 27-29, 37-41.

<sup>99</sup> See 10 C.F.R. § 2.309(f)(1)(i).

<sup>100</sup> See *id.* at § 2.309(f)(1)(ii).

<sup>101</sup> See *id.* at § 2.309(f)(1)(vi).

<sup>102</sup> Staff’s Response to Tribe at 18.

<sup>103</sup> *Id.* at 18-19.

<sup>104</sup> Staff’s Response to Consolidated Petitioners at 40; see *also* Order at 56 (“... nothing in Dr. LaGarry’s Opinion counters a specific portion of the application.”).

<sup>105</sup> Transcript at 315:10-25.

irrelevant if the Tribe does not sufficiently support the possibility of hydrogeologic interconnectivity.<sup>106</sup> Thus, insofar as each of the contentions is constructed by the Board based upon Dr. LaGarry's opinion, each contention is legally insufficient per the factors of 10 C.F.R. § 2.309(f)(1).

C. The Board Erred in Admitting the Tribe's Environmental Contention B.

The Tribe alleged the following as 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.<sup>107</sup>

According to the Board, the Tribe supports this contention by asserting that (1) "because the Crow Butte mining site is part of the land granted to the Sioux Nation in the 1851 Treaty, any artifacts or cultural resources found there would be connected with the Tribe" and (2) "that Crow Butte is not equipped to identify, to evaluate, or to preserve these artifacts, and that consultation with the Tribe is therefore essential."<sup>108</sup>

In its response to this contention, the Staff acknowledged that Section 106 of the NHPA imposed a consultation requirement, but stated that the burden of this consultation obligation is placed upon the Staff, not upon the Applicant.<sup>109</sup> Thus, the Staff argued that the Tribe's claim against the Applicant for failure to consult is both misdirected and unripe (as the Staff is not required at this time to engage that process and has not yet begun the required

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<sup>106</sup> See Tribe's Petition at 7; see *also* Order at 29.

<sup>107</sup> Tribe's Petition at 30.

<sup>108</sup> Order at 30.

<sup>109</sup> Staff's Response to the Tribe at 22.

Section 106 evaluation process).<sup>110</sup> In response, the Board states,

Despite the Staff's assurance that it would uphold its statutory obligation by inviting the Tribe to participate in consultation on identified cultural resources at the CBR site as part of its NEPA review for the pending license renewal,<sup>111</sup> the Board finds 'such assurances are no substitute for enabling the Tribe to prosecute its contention here' and, furthermore, if the Board 'were to deny all claims because an adverse party promises to fulfill its duties, [it] would subvert the hearing process.'<sup>112</sup>

The Board notes that "imposing such hardships on a petitioner will tilt the balance in favor of determining that a matter is ripe for adjudication."<sup>113</sup> "The fact that there appear to have been no consultations between the NRC Staff and the Tribe for at least thirteen years ... makes this matter more than ripe for adjudication."<sup>114</sup> The Board thus finds this contention admissible.<sup>115</sup>

In finding the Tribe's Environmental Contention B admissible, the Board committed several errors: (1) the Board found the contention admissible based, in part, on what it considers to be the unfairness with respect to late-filed contentions and document disclosure; (2) the Board bases its finding on matters outside the scope of this proceeding; and (3) the contention fails several of the 10 C.F.R. § 2.309(f)(1) requirements. Each of these errors is discussed in turn.

In determining the ripeness of the contention, the Board concludes that if it were now to find the contention premature "once such a contention subsequently becomes 'ripe' under the severe admissibility test the NRC Staff seeks to employ, the NRC Staff could then seek

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<sup>110</sup> *Id.*

<sup>111</sup> See Transcript at 365:5-12.

<sup>112</sup> Order at 31.

<sup>113</sup> *Id.* at 32.

<sup>114</sup> *Id.* at 35.

<sup>115</sup> *Id.* at 35-36 (*internal citations omitted*).

to characterize it as a 'late-filed contention' subject to much more rigorous admissibility standards."<sup>116</sup> The Board seeks here to overlook the requirement that a contention must raise a ripe issue because of the Board's apparent concern about whether the Tribe could later meet the Commission's requirements associated with late-filed contentions. It was error to admit this contention based on an apparent concern regarding the stringency associated with late-filed contentions, should that be applicable at a later time.<sup>117</sup>

The Board asked that if it were to deny this contention as being premature would Staff be willing to turn over to the petitioners documents associated with its NHPA-required review of cultural resources.<sup>118</sup> The Staff responded by saying that such documents would, most likely, be available on public ADAMS, but, regardless, that there is nothing in the Commission's regulations that requires the Staff to so disclose materials.<sup>119</sup> The Board says this about the Staff's refusal: "Procrustes could not have devised a more odious method of frustrating petitioners than NRC proposes here."<sup>120</sup> The Board is, in essence, applying a document disclosure requirement that has no foundation in the Commission's regulations or associated guidance.<sup>121</sup> Moreover, the document disclosure process does not provide a proper basis to declare a contention admissible that does not otherwise meet the

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<sup>116</sup> *Id.* at 31-32.

<sup>117</sup> In the future, should the Tribe wish to raise a late-filed contention based on the Staff's failure to consult under the applicable provisions of the NHPA, the Staff would not raise an objection based on the failure of the Tribe to file on time, assuming the Tribe files the contention within 30 days of receiving the new information necessary to the formation of that contention. See Order (Regarding Schedule and Guidance for Proceeding), at 3 (Aug. 21, 2008).

<sup>118</sup> See Transcript at 311:1-9.

<sup>119</sup> See *id.* at 311:23-25 – 312:1-8.

<sup>120</sup> Order at 32.

<sup>121</sup> See 10 C.F.R. §§ 2.336(b), 2.1203.

requirements of 10 C.F.R. § 2.30(f)(1).

Further, alleged violations of the consultation requirement of the NHPA associated with prior Commission-approved licensing actions are not within the scope of this proceeding,<sup>122</sup> and, thus, cannot be the basis for admitting contentions here. Simply stated, speculation that the Staff will not meet the consultation requirements of the NHPA in this matter is an insufficient basis upon which to admit a contention.<sup>123</sup>

Even if the contention is framed as a challenge to the list of identified cultural resources proffered by the Applicant as part of its LRA, the contention is, nonetheless, deficient because it does not meet the 10 C.F.R. § 2.309(f)(1) requirements.<sup>124</sup> The Tribe does not assert any issue with the list other than it did not have an opportunity to evaluate the cultural resources on the list. The issue it does present, that it has not been given the opportunity prior to its submission as part of the LRA to evaluate that list, is not material to any of the findings the NRC must make as part of its review, nor does it manifest a genuine dispute with the Applicant.<sup>125</sup>

D. The Board Erred in Admitting the Tribe's Environmental Contention E.

The Tribe propounded as 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.'<sup>126</sup>

As support for this contention, the Tribe cites to a complaint against CBR filed by the

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<sup>122</sup> See *USEC*, CLI-06-9, 63 N.R.C. at 446.

<sup>123</sup> See *Fansteel*, CLI-03-13, 58 NRC at 203.

<sup>124</sup> See Tribe's Petition at 15.

<sup>125</sup> See 10 C.F.R. §§ 2.309(f)(1)(iv), (vi).

<sup>126</sup> Tribe's Petition at 21.

NDEQ in the District Court for Lancaster County, Nebraska in May, 2008.<sup>127</sup> The complaint contains three claims regarding purported violations of an Underground Injection Control Permit (No. NE0122611) held by the Applicant.<sup>128</sup> The parties to that proceeding entered into a consent decree, under which Applicant agreed to a civil penalty.<sup>129</sup> As documented in the consent decree, the Applicant, as a defendant to that action, entered into the consent decree for the purpose of settlement only, without admitting to any of the allegations of the complaint.<sup>130</sup> The Tribe provides no additional substantiation of the claims set out in the NDEQ complaint.

The Board, nevertheless, finds that “[t]he Tribe’s allegations create a genuine dispute with the application on a material issue of law or fact” and, furthermore, the Tribe “has demonstrated how [the violation set out in the NDEQ complaint] support a challenge to the statement in the License Renewal Application that all wastes generated during Crow Butte’s licensed ISL uranium mining operations are disposed elsewhere.”<sup>131</sup> Thus, the Board holds this contention admissible.

The Board’s holding is rooted in two fundamental legal errors. First, the Tribe’s claim is not material to a finding the NRC must make as part of its review of the LRA.<sup>132</sup> In addition, the NDEQ complaint does not stand for the proposition the Tribe asserts. “In the

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<sup>127</sup> *Id.* at 21-22.

<sup>128</sup> NDEQ Complaint at 1-3 (State of Nebraska, Nebraska Dept. of Env. Quality v. Crow Butte Res., Inc., Dist. Ct. of Lancaster, NE Case No. CL08-2248).

<sup>129</sup> Consent Decree at 3-4 (State of Nebraska, Nebraska Dept. of Env. Quality v. Crow Butte Res., Inc., Dist. Ct. of Lancaster, NE Case No. CL08-2248).

<sup>130</sup> *Id.* at 2.

<sup>131</sup> Order at 42.

<sup>132</sup> See 10 C.F.R. § 2.309(f)(1)(iv).

case of a document, the Board should review the information provided to ensure that it does indeed supply a basis for the contention.”<sup>133</sup> The Tribe claimed that the Applicant “has disposed of water in a manner that is inconsistent with the requirements for its application.”<sup>134</sup> In essence, the Tribe alleged, on the basis of the NDEQ complaint, that Applicant “simply dumped [waste water] on the ground.”<sup>135</sup> The NDEQ complaint does not allege that contamination occurred.<sup>136</sup> In the consent decree, it is actually stated that the “treatment of ... well development water did not result in any pollution of either the surface of the ground or any aquifer thereunder.”<sup>137</sup> Thus, the Tribe provided no factual support for this contention, and the Board committed a legal error by not denying it.

E. The Board Erred in Admitting the Consolidated Petitioners’ Environmental Contention E.

The Consolidated Petitioners propounded as Environmental Contention E:

Cost Benefits as discussed in the LRA Fail to Include Economic Value of Environmental Benefits.<sup>138</sup>

According to the Board, the Consolidated Petitioners raise with this contention the issue “whether wetlands are being degraded by virtue of the migration of contaminants from Crow Butte’s licensed mining operations” and whether “the License Renewal Application

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<sup>133</sup> *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 181 (1998).

<sup>134</sup> Tribe’s Petition at 22.

<sup>135</sup> *Id.*

<sup>136</sup> See NDEQ Complaint at 2-4 (NDEQ alleges that CBR “constructed injection wells and mineral production wells in a manner that had the potential to allow the movement of fluid containing contamination into an underground source of drinking water.”).

<sup>137</sup> Consent Decree at 2.

<sup>138</sup> Consolidated Petitioners’ Petition at 28.

improperly fails to account for such migration.”<sup>139</sup> The Staff does not dispute that if an impact to wetlands in the area were found, the Staff would conduct a value assessment of the wetland as part of the Staff’s NEPA analysis.<sup>140</sup> However, this contention should not have been admitted since the Consolidated Petitioners simply have not alleged that there are wetlands in the vicinity of the CBR facility that would be affected by CBR’s continued operation. Further, the Petitioners do not set forth any basis to claim that wetlands have existed and would return to the area should CBR shut down. Therefore, this contention fails the factual basis requirement of 10 C.F.R. § 2.309(f)(1)(v) since it lacks the requisite basis in fact.

F. The Board Erred in Admitting Consolidated Petitioners’ Tech. Contention F.

Consolidated Petitioners proffered as Technical Contention F the following:

Failure to include recent research – see LaGarry opinion.<sup>141</sup>

In support of this contention, Consolidated Petitioners quoted the first paragraph of Section 2.6 of the LRA and, immediately thereafter, posed this question, “Why is CBR referring to the old data and old research when there is more recent research?”<sup>142</sup> In its response, the Staff argued that there is no requirement that the Applicant consider the research or opinions of any particular person or entity.<sup>143</sup> While the Board agrees, it considers the issue presented by this contention to be “the reliability of scientific evidence in order for Crow Butte’s License Renewal Application to be complete and accurate. What Crow Butte must consider is recent research that allegedly describes the geology more

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<sup>139</sup> Order at 51-52.

<sup>140</sup> See Transcript at 272:17-22.

<sup>141</sup> Consolidated Petitioners’ Petition at 30.

<sup>142</sup> *Id.*

<sup>143</sup> Staff’s Response to the Consolidated Petitioners at 40.

accurately than those sources Crow Butte references.”<sup>144</sup> While not cited as part of the contention by the Consolidated Petitioners, the Board nonetheless discusses the comments and recommendations of Paul Robinson, Research Director for Southwest Research Information Center, in a report attached to the Petition.<sup>145</sup> According to the Board, Mr. Robinson “notes that two of Crow Butte’s references in the [LRA] were [EPA] guidance documents for groundwater monitoring (from 1974 and 1977) that he claims are out of date and more recent and appropriate guidance documents (from 1992 and 2000) that should have been used.”<sup>146</sup> The Board additionally finds that the expert opinion of Dr. LaGarry provides support for this contention.<sup>147</sup> The Board thus finds the contention admissible.

In finding this contention admissible, the Board committed several errors. First, the Commission does not permit the “filing of vague, unparticularized contention[s].”<sup>148</sup> As admitted, this contention is so vague as to potentially include the entire LRA within its purview. Second, the Board cannot properly reformulate a contention when the contention is otherwise legally insufficient.<sup>149</sup> Petitioner’s discussion of this contention in its petition does not include any mention of Mr. Robinson’s opinion, nor does it identify how or why Dr. LaGarry’s opinion is relevant.

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<sup>144</sup> Order at 55.

<sup>145</sup> *Id.* (citing Comments and Recommendations Regarding the “Application for 2007 License Renewal USNRC Source Materials License SUA-1534 Crow Butte License Area” by Paul Robinson, Research Director, Southwest Research and Information Center (July 28, 2008) (“Robinson”).

<sup>146</sup> *Id.* (quoting Robinson at 4).

<sup>147</sup> *Id.* at 55-56.

<sup>148</sup> *Seabrook*, CLI-99-6, 49 NRC att 219 (quoting *Calvert Cliffs*, CLI-98-25, 48 NRC at 349).

<sup>149</sup> See *G.I.T.*, LBP-95-6, 41 NRC at 305.

G. The Board Erred in Admitting Consolidated Petitioners' Misc. Contention G.

The Consolidated Petitioners proposed as Miscellaneous Contention G the following:

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.<sup>150</sup>

The Board admits as Contention G the question, "Whether the foreign ownership of an applicant must be disclosed in each and every source materials license renewal application."<sup>151</sup> The Board appears to rely upon 10 C.F.R. § 40.9 as a regulatory requirement for the completeness and accuracy of information in the Application with which the Applicant must comply,<sup>152</sup> however, 10 C.F.R. § 40.9 is an enforcement provision and is not relevant to the findings the NRC must make regarding its review of the Application.<sup>153</sup> Therefore, the Board committed a legal error by not denying this contention.

H. The Board Erred in Admitting Consolidated Petitioners' Misc. Contention K.

The Consolidated Petitioners proposed as Miscellaneous Contention K the following:

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.<sup>154</sup>

The Board admits Contention K as it relates to the issue of foreign ownership.<sup>155</sup>

There is no prohibition regarding in situ leach recovery facilities in the Atomic Energy Act or

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<sup>150</sup> Consolidated Petitioners' Petition at 32.

<sup>151</sup> Order at 68.

<sup>152</sup> See *id.* at 63.

<sup>153</sup> See 10 C.F.R. § 2.309(f)(1)(iii).

<sup>154</sup> Consolidated Petitioners' Petition at 36.

<sup>155</sup> Order at 74.

in 10 C.F.R. Part 40 against foreign ownership. The Consolidated Petitioners have not alleged with sufficient specificity why the foreign ownership of the facility would be inimical to common defense and security.<sup>156</sup> The only risk the Consolidated Petitioners discuss is that natural uranium may end up in foreign hands.<sup>157</sup> This assertion is merely speculation and cannot support the admission of a contention.<sup>158</sup> Thus, the Board committed an error by not denying this contention.

### CONCLUSION

In light of the foregoing, the Staff respectfully requests that the Commission reverse the decision of the Board and deny the petition for intervention and request for hearing of the Tribe and deny the petition for intervention and request for hearing of the Consolidated Petitioners.

Respectfully submitted,

**Executed in Accord with 10 CFR 2.304(d)**

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Dated at Rockville, Maryland  
This 10<sup>th</sup> day of December, 2008

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<sup>156</sup> See 10 C.F.R. § 40.32(d).

<sup>157</sup> See Consolidated Petitioners' Petition at 40.

<sup>158</sup> See *Fansteel*, CLI-03-13, 58 NRC at 203.

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 for the In Situ Leach Facility, )  
Crawford, Nebraska) )

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S NOTICE OF APPEAL OF LBP-08-24, LICENSING BOARD'S ORDER OF NOVEMBER 21, 2008, AND ACCOMPANYING BRIEF" in the above-captioned proceeding have been served on the following persons by Electronic Information Exchange on this 10<sup>th</sup> day of December, 2008:

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**Executed in Accord with 10 CFR 2.304(d)**  
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