LBP-09-01

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Ann Marshall Young, Chair
Dr. Richard F. Cole
Dr. Fred W. Oliver

In the Matter of CROW BUTTE RESOURCES, INC. (License Amendment for the North Trend Expansion Project)	Docket No. 40-8943 ASLBP No. 07-859-03-MLA-BD01 January 27, 2009

MEMORANDUM and ORDER
(Ruling on Foreign Ownership and Arsenic Contentions and Other Pending Matters)

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I. Introduction and Background

This Memorandum and Order follows our earlier ruling in LBP-08-6,[1] and like it, concerns the Application of Crow Butte Resources, Inc. (CBR, Crow Butte, Crow Butte Resources, or Applicant), to amend its operating license for its in-situ leach (ISL) uranium recovery facility in Crawford, Dawes County, Nebraska,[2] to permit development of additional ISL uranium mining resources in a nearby location. In LBP-08-6 we granted the hearing requests and admitted three contentions of Petitioners (now Intervenors) Western Nebraska Resources Council (WNRC), Owe Aku/Bring Back the Way (Owe Aku), and Debra L. White Plume, challenging certain aspects of the Application. We also ruled that the Oglala Sioux Tribe may participate in the hearing pursuant to 10 C.F.R. § 2.315(c), and now note that the Tribe has indicated its intent to participate as to Contentions A, B, and C.[3] Additional information concerning ISL mining, the standing of Intervenors to participate in the proceeding, the contentions we then admitted, and related matters may be found in LBP-08-6.

In this Memorandum and Order we rule on (1) Intervenors' Contention E, which concerns the alleged ownership of the Applicant by Cameco, Inc., a Canadian corporation, Applicant's alleged failure to disclose such foreign ownership in its Application, and certain alleged consequences arising from such foreign ownership; (2) certain additional matters related to Contention E, including whether Intervenors must show standing separately with regard to Contention E, as argued by Applicant, and Intervenors' request for certain sanctions (alternatively a default order with regard to certain facts or payment of the monetary costs of the Intervenors in addressing an NRC Staff motion for reconsideration that was subsequently

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[1] *Crow Butte Resources, Inc.* (License Amendment for the North Trend Expansion Project), LBP-08-6, 67 NRC 241 (2008).

[2] Source Materials License, SUA-1534.

[3] *See* Official Transcript of Proceedings (Tr.) at 421.

withdrawn); (3) a new contention Intervenors seek to have admitted, regarding arsenic contamination and health impacts allegedly resulting from Crow Butte's mining operations; (4) the participation of the Black Hills/Oglala Delegation of the Great Sioux Nation Treaty Council in this proceeding; (5) the Intervenors' request for a Subpart G hearing; and (6) an Unopposed Motion to Make Filings by Email.

We herein find that Intervenors are not required to show standing separately for Contention E; admit Contention E; deny Intervenors' request for sanctions; permit Intervenors' allegations regarding arsenic and health impacts (diabetes and pancreatic cancer) allegedly resulting from Applicant's mining operations to be adjudicated in connection with previously-admitted Contention B; rule that the Black Hills/Oglala Delegation of the Great Sioux Nation Treaty Council may participate in the proceeding under 10 C.F.R. § 2.315(c); refer to the Commission our recommendation regarding Intervenors' request for a Subpart G hearing; and grant the motion to permit filings by email, as specified below.[4]

II. Intervenors' Contention E and Related Matters

In Contention E Intervenors allege a failure on the Applicant's part to disclose in its Application its ownership by a foreign corporation, and various consequences of such foreign ownership.[5] At this point it might be said that the contention deals more with the significance than the disclosure of such ownership, however, given that Applicant, as we discuss herein, has acknowledged that the ultimate owner of Crow Butte is in fact Cameco, a Canadian corporation.[6] We address this and related matters below, in our ruling on the admissibility of the contention. First, however, we address a threshold issue raised by the Applicant, to the effect

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[4] *See infra* § VII.

[5] *See infra* § II.B.1.

[6] *See infra* n.78; Tr. at 475-77.

that we should not consider the contention at all because Intervenors have not shown standing to submit it, as Applicant insists they must do.[7] We next turn to the admissibility of Contention E under the provisions of 10 C.F.R. § 2.309(f)(1)(i)-(vi), and conclude this section of this Memorandum by addressing Intervenors' request for sanctions against the NRC Staff with regard to a motion for reconsideration relating to Contention E that Staff submitted and then withdrew.

A. Whether Separate Showing of Standing to Raise Contention E is Required

Applicant argues that Intervenors must show standing with regard to Contention E specifically and separately from its standing to litigate the other contentions already admitted herein, in order to raise and litigate Contention E.[8] We find this argument to be without merit.

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[7] We note Applicant's argument that, in its view, "[h]aving concluded that Petitioners have standing for Contentions A and B based on claims under 10 C.F.R. §§ 40.32(c) and 51.45, the Licensing Board must also assess standing for Contention E under 10 C.F.R. § 40.32(d)." Applicant's Reply to Petitioners' Filing re Standing (Aug. 29, 2008) at 4 [hereinafter Applicant 8/29/08 Reply]. We did not, of course, in LBP-08-6, "conclude that Petitioners have standing for Contentions A and B." We found that they had standing to participate in the proceeding, with no such limitation. Applicant urges that we in effect recast our prior rulings on standing in accord with its arguments regarding Contention E. We consider and address these arguments herein.

We note as well Applicant's reference to "the Board's apparent decision to consider the ownership of Crow Butte to be an issue within the scope of this narrow license amendment proceeding." *Id.* at 3. We can understand that the Applicant may have gathered in oral argument that we had some questions regarding its assertions about the nature of this proceeding and its scope *vis-à-vis* Contention E, but we cannot commend its characterization. Our goal in providing for both oral argument and further briefing on the issues involved with Contention E was to afford Applicant, as well as all other parties, full opportunity to attempt to persuade us to accept their respective positions through reasoned legal analysis of the issues. Our decision herein, however, is the first we make on these issues, and we make it only after careful consideration of the arguments of all parties.

We caution Applicant and all parties to use care in characterizing not only any Licensing Board actions, but also those of any other parties, in the interest of civility and the most effective progress through the course of this legal proceeding.

[8] *See* Applicant's Brief Regarding Foreign Ownership Issues (May 23, 2008) at 12 [hereinafter Applicant 5/23/08 Brief].

First, no language in the NRC rule on standing and contentions even suggests such a requirement.[9] This is significant given that NRC intervention rules are well-known to be strict,[10] and any such requirement, if it existed, should be found somewhere in the rule, in at least comparable specificity to that found at 10 C.F.R. § 2.309(d). This section spells out the standing requirements, including those at subsection(d)(1)(iii), requiring a petitioner to state "the nature and extent of [his/her/its] property, financial or other interest in the proceeding" — a concept separate and apart from that of what constitutes a "contention." We note in this regard that the source of the practice in NRC proceedings of referring to judicial standing concepts is a 1976 Commission decision in which it "affirm[ed] the Appeal Board's determination that [petitioners in the case did] not meet the judicial standing test."[11] The Commission decided that "in determining whether a petitioner . . . has alleged an '*interest* [[which]] may be affected by the proceeding' within the meaning of Section 189a of the Atomic Energy Act and [then-existing] Section 2.714(a) of NRC's Rules of Practice, contemporaneous judicial concepts of standing should be used," including those regarding the "zone of interests" test.[12] But the decision contains no mention of the need to show standing for each separate contention submitted by any petitioner.

Further, although a petitioner bears the burden of demonstrating standing, in ruling on standing a licensing board is to "construe the petition in favor of the petitioner,"[13] an approach

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[9] *See* 10 C.F.R. § 2.309.

[10] *See*, *e.g.*, *Virginia Elec. & Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-146, 6 AEC 631, 633-34 (1973).

[11] *Portland Gen. Elec. Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976).

[12] *Id.* at 613-14 (emphasis added).

[13] *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

inconsistent with Applicant's argued approach. Nor is there any other Commission authority to support Applicant's argument.[14]

To the contrary, the Commission stated in the *Yankee Atomic Electric Company* license decommissioning case 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."[15] Applicant interprets this as requiring a "nexus between the injury . . . and the contention,"[16] and argues, based on *Yankee*, that "the injuries alleged by Petitioners — potential harm from contaminated surface water and groundwater — are not caused by the fact that a domestic entity has a foreign 'grandparent.'"[17] This reasoning turns the Commission's *Yankee* ruling on its head. The Commission actually, in citing the Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group*[18] as

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[14] We note Applicant's suppositions that the lack of more Commission decisions addressing the issue, whether standing must be shown with regard to each contention raised, may be because most Commission adjudications "involve power reactor [cases] subject to the 'proximity presumption,'" which permits "petitioners [to] raise any issue linked to offsite injury within the scope of a proceeding," or "may simply reflect a failure . . . to incorporate contemporaneous judicial concepts of standing into NRC proceedings — a [sic] oversight that this Board now has the opportunity to remedy." Applicant's Response to Board Order Regarding Standing (Aug. 15, 2008) at 3 [hereinafter Applicant 8/15/08 Response]. We see no evidence of any oversight and note that it should be beyond question that, while "contemporaneous judicial concepts of standing" are indeed relied upon in NRC adjudications, it is not appropriate merely to incorporate any and all judicial standing concepts into an NRC proceeding when such concepts concern matters of federal court practice that have no comparable counterpart in NRC adjudicatory practice. We discuss *infra* some comparisons between NRC proceedings and federal court proceedings.

[15] *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996).

[16] Applicant 8/15/08 Response at 2.

[17] Applicant 8/29/08 Reply at 2.

[18] 438 U.S. 59 (1978).

support for its own ruling, specifically noted that the *Duke* Court "reject[ed] a requirement for a 'nexus' between the injury claimed and the right being asserted."[19]

Applicant also argues that any alleged injuries in this proceeding "will not be redressed (*i.e.*, afforded relief) by a favorable decision with respect to Contention E [because, e]ven if the

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[19] *Yankee*, CLI-96-1, 43 NRC at 6 (citing *Duke*, 438 U.S. at 78-81). We note that the Commission also made the following statement, in a footnote:

> Section 2.714(g) of 10 C.F.R. provides that an intervenor's participation may be limited in accordance with its interests. We construe this provision in accordance with the cited case law, i.e., that an intervenor's contentions may be limited to those that will afford it relief from the injuries asserted as a basis for standing.

Id. at 6 n.3. But the provision of 10 C.F.R. § 2.714(g), found in NRC's pre-2004 rules, does not appear in the current rules. And even reading the Commission's statement in footnote 3 of *Yankee* as still being good law, notwithstanding the current inapplicability of the provision that was its basis, the only limitation that it would warrant would be one where a proffered contention would *not*, if successfully litigated, afford it any "relief from the injuries asserted as a basis for standing." Of course, if a merits ruling in favor of Intervenors on Contention E led to denial of the applied-for license amendment herein, this would in fact afford them relief from their asserted injuries, as they in fact argue. *See* Petitioners' Corrected Reference Petition (Jan. 9, 2008) at 8 [hereinafter Reference Petition].

We note one additional statement of the Commission in *Yankee*, applying its holding to the petitioners in that case:

> Assuming *arguendo* that the Licensing Board determines that Petitioners do indeed have standing to intervene in this proceeding, they will then be free to assert any contention, which, if proved, will afford them the relief they seek, *i.e*. the rejection or *modification* of the Yankee NPS decommissioning plan *in a manner that will redress their asserted injuries*.

Yankee, CLI-96-1, 43 NRC at 6 (emphasis added). We do not find that this would lead to any different result herein. First, this statement appears to be based on the interpretation of former § 2.714(g) found in footnote 3. But even if it is not so limited, this would not automatically mandate a different result herein. Assuming, for example, that an argument were made that the italicized language following the "*i.e.*" should prevent Intervenors from arguing for a license condition that concerned only financial or corporate arrangements and did nothing to address the alleged water contamination injuries that are the basis for their standing, we would not necessarily find merit in such an argument. This is because, in contrast to the *new activity* being proposed for approval in this proceeding, *Yankee* involved a proposed decommissioning plan — or plan seeking to *end* a licensed activity — and contentions seeking modification of the plan or an alternative plan. *Id.* Such contentions were, in *Yankee*, the *only* realistic relief possible, as the question in a decommissioning or license termination case is not whether or not to approve a *new* proposed activity, but how a licensee should go about *ending* the *already-licensed activity*. In comparison, any license condition that might be ordered in a case such as this one, involving a proposed *new* activity, would be more akin to a "lesser included penalty" of outright denial of a license. In any event, as applied to this proceeding the Commission's holding in *Yankee*, read fairly, clearly is that standing need not be shown for each separate contention.

license amendment application for the North Trend Expansion is denied, Crow Butte will still continue its operations at its remaining mine units."[20] But this reasoning also fails. The same argument might be made regarding any contention. If Intervenors were to establish in a hearing that, based on *any* of its contentions, Crow Butte should not be granted the sought license amendment, this is the extent of the relief possible in this proceeding. In sum, the Applicant's arguments based on the Commission's decision in *Yankee* are without merit.

Finally, although there is indeed, as Applicant argues, Supreme Court and other federal court authority to the effect that "a plaintiff [in federal court] must demonstrate standing separately for each form of relief sought,"[21] and for each separate "claim,"[22] these do not translate into a requirement that a petitioner must show standing for each contention submitted in an NRC proceeding.

Regarding the need in federal court to show standing for each "form of relief sought," a contention is not, of course, a "form of relief." Rather, it is an allegation *contended* by a petitioner as *grounds* for the petitioner's challenge to the grant of a license, license amendment, license renewal, etc. Generally, the only relief sought by petitioners challenging issuance of an applicant's applied-for license, license amendment, license renewal, or other approval, is denial of the application in question — such denial is argued to be necessary to provide relief from petitioners' asserted injuries.

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[20] Applicant 8/29/08 Reply at 2.

[21] *See id.* (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 185 (2000)).

[22] *See* Applicant 8/15/08 Response at 4 (citing *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759, 2769 (2008); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Lewis v. Casey*, 518 U.S. 343, 357 (1996); *Rosen v. Tenn. Comm'r of Finance and Admin.*, 288 F.3d 918 (6th Cir. 2002)).

Just so, in this proceeding Intervenors oppose issuance of the license amendment for which Applicant Crow Butte has applied, asserting injuries related to contamination of water and air and arguing that "denial of the amendment would protect [their] health, wellbeing and property values."[23] A finding in their favor on the merits of *any* admitted contention may lead to the "relief sought" by them – *i.e.*, denial of the requested license amendment. Contention E is no different in this regard. It is but one of the grounds put forth by Intervenors in support of their argument that the license amendment sought by Crow Butte with regard to its "North Trend Expansion Site" should be denied. Thus, federal case law requiring a separate showing of standing for each "form of relief sought" in an Article III court would not bar Intervenors from raising Contention E.

Nor do the cases cited by Applicant for the need to show standing for each separate "claim" warrant a different result. Close consideration of the cases in question reveals that the term "claim," as used in them, refers to a challenge (to a particular action, rule or law) that is actually *tied to* a request for *relief specific to that challenge.* This is in contrast to a "contention" in NRC practice, which, again, is merely one allegation or ground, generally among several, put forward to support a challenge to one action (typically, as indicated above, NRC approval and issuance of an applied-for license, license amendment, or similar approval or action) that is the subject of any relief requested.[24]

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[23] Reference Petition at 8.

[24] We observe that both words — "claim" and "contention" — are the sort of terms that may be used in a number of ways, and that this is the source of some of the confusion surrounding their use in relation to each other. For example, each word may be used both as a legally significant term and more generically. To illustrate, it would not be unusual in a federal court decision for a court to state, "It is Plaintiff 's contention with regard to this claim that . . . ." And it would not be unusual for an NRC licensing board to state, "In support of this contention Petitioner makes several claims." In the first statement the word "contention" is used in a more generic way and the word "claim" has a more legally significant meaning, whereas in the second statement the word "contention" has a legally significant meaning and the word "claim" is used in generic sense. As legally significant terms the two words are obviously not automatically

The 2002 *Rosen* case cited by Applicant was a class action case in which several current and former enrollees in "TennCare," Tennessee's alternative to Medicaid under a federal waiver of various federal Medicaid eligibility rules, had, on behalf of a class of present and future TennCare applicants and beneficiaries, challenged some of the State's actions and procedures in making TennCare eligibility determinations.[25] One "claim" at issue involved a motion to enforce one of several agreed orders that had been entered in the case, on various grounds.[26] Another claim concerned a challenge to a new state rule, adopted after commencement of the lawsuit, which had the effect of closing TennCare to uninsurable persons not otherwise eligible for benefits, who had not enrolled or submitted applications prior to October 1, 2001.[27] The Court of Appeals, citing the principle that "standing is a claim-by-claim issue,"[28] held that the named plaintiffs, who had enrolled prior to October 1, 2001, did not have standing to challenge implementation of the "October 1 rule."[29]

In *Davis v. Federal Election Commission*, a case decided by the Supreme Court in 2008, a self-financed candidate for Congress who had spent sums in excess of $1 million in prior campaigns successfully challenged the constitutionality of section 319 of the Bipartisan Campaign Reform Act of 2002.[30] In reaching its determination that Davis faced injury from the

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equivalent to each other, merely because they may, depending upon context and manner of use, have the same meaning when used in a more generic sense. Language is not such a mechanical matter, and precision in language and its meaning demands close attention to such things as context and manner of use.

[25] *Rosen*, 288 F.3d at 921.

[26] *Id.* at 922.

[27] *Id.*

[28] *Id.* at 928.

[29] *Id.* at 929; *see also id.* at 927-31.

[30] *Davis*, 128 S.Ct. at 2766-68.

operation of, and had standing to challenge, both the disclosure requirements of § 319(b)[31] and the "scheme of contribution limitations that applies when § 319(a) comes into play,"[32] the Supreme Court noted in dicta that the fact that he had standing for one did "not necessarily mean that he also ha[d] standing to challenge" the other.[33] In making this observation the Court quoted the principle, from its 1996 decision in *Lewis v. Casey*, that "standing is not dispensed in gross,"[34] as well as its statement in the 2006 *DaimlerChrysler v. Cuno* case that, "[r]ather, 'a plaintiff must demonstrate standing for each claim he seeks to press' and 'for each form of relief' that is sought."[35]

It is apparent that both *Davis* and *Rosen* involved multiple "claims" challenging separate actions or regulatory or statutory provisions, and concerning corresponding requests for separate and different forms of relief — *i.e.*, the overturning of separate actions and statutory or regulatory provisions. In neither case was any argument, or ruling, made that a plaintiff had to show standing for each allegation argued to constitute a ground to overturn one particular action or provision.

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[31] *Id.* at 2768.

[32] *Id.* at 2769. Section 319(a) had been called the "Millionaire's Amendment" and provided that, when a self-financed candidate spent over $350,000 of personal funds, the candidate's "non-self-financing" opponent would be permitted to receive contributions that would otherwise exceed certain limitations on campaign contributions. *See id*. at 2766. The Court found that Davis had standing to challenge Section 319(a) because, even though his opponent had "adhered to the normal contribution limits," *id.* at 2767, and chosen not to take advantage of the "asymmetrical limits" that exceeded the normal limitations, *id.* at 2769, Davis had indicated his intent to spend more than $350,000 and "there was no indication that his opponent would forgo [the] opportunity" to "receive contributions on more favorable terms." *Id.*; *cf. Rosen*, 288 F.3d at 929-31.

[33] *Davis*, 128 S.Ct. at 2768-69.

[34] *Id.* at 2769 (quoting *Lewis*, 518 U.S. at 358 n.6).

[35] *Davis*, 128 S.Ct. at 2769 (quoting *DaimlerChrysler*, 547 U.S. at 352, *Friends of Earth*, 528 U.S. at 185).

The *Lewis* case cited by the Court in *Davis* was a class action brought by inmates of Arizona's prison system, alleging deprivation of their rights of access to the courts and counsel; the case involved issues of proportionality between the extent of injuries proven and remedies ordered. The only actual injury found by the District Court concerned the "failure of the prison to provide the special services that [one inmate] would have needed, in light of his illiteracy, to avoid dismissal of his case."[36] The Supreme Court found that the District Court's injunctive order mandating "sweeping changes" — including specifying "in minute detail" library hours, educational requirements for law librarians, the content of a legal-research course for inmates, "direct assistance" to illiterate and non-English-speaking inmates[37] — was unwarranted.[38] Stating that the requirement to show actual injury "derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches,"[39] the Court also observed that "[t]he actual-injury requirement would hardly serve th[is] purpose . . . if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy *all* inadequacies in that administration."[40] Further, as Intervenors point out,[41] the Court noted, "[i]f the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all*

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[36] *Lewis*, 518 U.S. at 358.

[37] *Id.* at 347

[38] *Id.* at 358-64.

[39] *Id.* at 349. Interestingly, the Court in addition observed in a footnote that "[o]ur holding regarding the inappropriateness of systemwide relief for illiterate inmates does not rest upon the application of standing rules, but rather . . . upon 'the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system.'" *Id.* at 360 n.7.

[40] *Id.* at 357.

[41] Petitioners' Response to Applicant's Submission Re: Standing (Aug. 22, 2008) at 5 [hereinafter Petitioners 8/22/08 Response].

administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review."[42]

The situation in *Lewis* is obviously a far cry from that in the instant proceeding. Apart from the fact that *Lewis* involved the merits findings of the District Court, this proceeding concerns only Intervenors' challenge to issuance of the applied-for license, and there is no chance that any appeal arising out of this proceeding could "bring the whole structure of [NRC] administration before the courts for review." Even looking solely at the nature of the numerous remedies at issue in *Lewis* as compared to the singular relief of denial of the license amendment sought herein, the instant proceeding is obviously distinguishable from the *Lewis* case.

Finally, regarding standing for separate "claims," in the *DaimlerChrysler* case,[43] Toledo, Ohio, taxpayers had challenged certain municipal and state tax benefits offered to DaimlerChrysler to encourage it to expand its Jeep operation in Toledo, alleging on various

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[42] *Lewis*, 518 U.S. at 358 n.6.

[43] *DaimlerChrysler v. Cuno*, 547 U.S. 322. We note that Applicant has cited additional case law in support of its argument, including *Los Angeles v. Lyons*, 461 U.S. 95, 103, 106 (1983); and *Friends of the Earth, Bluewater Network Div. v. U.S. Dep't. of Interior*, 478 F.Supp.2d 11, 16 (D.D.C. 2007). *See* Applicant's Brief Regarding Foreign Ownership Issues (May 23, 2008) at 12-13 [hereinafter Applicant 5/23/08 Brief]. In the *Lyons* case, the issue was whether standing for injunctive relief had been shown, 461 U.S. at 97, and the Court held that, even if injury sufficient to show an existing case or controversy is established, this does not confer standing with regard to injunctive relief. *See id.* at 102-06. We address *supra* the distinction between "forms of relief" and contentions. The *Bluewater* case involved a rulemaking petition regarding the use of off-road vehicles in national parks. 478 F.Supp.2d at 12. The Court held that, while standing to challenge uniform, systemwide regulations required only that an association identify a single member with standing as to those counts and at least one "park unit," in order to show standing to challenge "site-specific regulations at 18 individual part units" an association had to "identify a member affected by each site-specific *action*." *Id*. at 16 (emphasis added). Again, this does not describe anything comparable to contentions, but rather concerns separate "actions," as in the *Rosen* case. We find that neither these nor any other cases cited by Applicant are authority for an argument that standing must be shown for each separate contention in an NRC proceeding.

grounds that these benefits violated the Commerce Clause of the Constitution.[44] The District Court found standing on the part of plaintiffs, "[a]t a bare minimum" as municipal taxpayers[45] under case law in which "the peculiar relation of the corporate taxpayer to the corporation" was noted "to distinguish such a case from the general bar on taxpayer suits,"[46] but found no Commerce Clause violation.[47] The Court of Appeals for the Sixth Circuit held that the state tax franchise credit at issue violated the Commerce Clause and did not address standing.[48] The Supreme Court, stating that "our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press,"[49] found the taxpayers' argument, that their status as municipal taxpayers gave them standing to challenge the state franchise tax credit,[50] to be without merit.[51]

The state tax claim in *DaimlerChrysler* was clearly connected to requested relief specific to that claim, thus distinguishing that case from the instant proceeding. Also, significantly for purposes of this proceeding, the *DaimlerChrysler* Court in reaching its holding in addition pointed out, in a footnote, that certain case law cited by the taxpayers in support of standing actually held "only" that, "once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have 'failed to

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[44] *DaimlerChrysler*, 547 U.S. at 337-38.

[45] *Id.* at 339-40.

[46] *Id.* at 349 (quoting *Frothingham v. Mellon*, decided with *Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923)); *see also id.* at 340.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 352.

[50] *Id.* at 349.

[51] *Id.* at 354.

comply with its statutory mandate.'"[52] Although the *Daimler* court found this principle inapplicable to the plaintiffs, it is clearly analogous to the situation before us; *i.e.*, "once a [petitioner] has standing to [challenge] a particular agency action, it may do so by identifying *all grounds* on which [a proposed agency action is challenged]."

In sum, a showing of standing need be made only once with regard to any one agency "action" or approval at issue. Intervenors clearly need not make separate showings of standing for each separate contention, which are not comparable either to "forms of relief" or Article III "claims," but are distinctly comparable to various "grounds" that may be asserted in opposition to a proposed agency action at issue.[53] As the Commission stated in adopting changes to 10 C.F.R. Part 2 in 2004, we are to look to judicial concepts of standing "where appropriate to determine those interests affected within the meaning of Section 189a of the [Atomic Energy

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[52] *Id.* at 353 n.5 (citing *Sierra Club v. Adams*, 578 F.2d 389, 392 (C.A.D.C. 1978); *Sierra Club v. Morton*, 405 U.S. 727, 737 (1972); *Iowa Independent Bankers v. Board of Governors of Fed. Reserve*, 511 F.2d 1288, 1293-1294 (C.A.D.C. 1975)). The Court stated that the taxpayers had misconstrued the case law in question in asserting that it supported their standing as state taxpayers based on it being "ancillary" to their standing as municipal taxpayers, and found that the case law in question did "not establish that the litigant can, by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him." *Id.* at 353 & n.5; *see also id.* at 351-353.

[53] In any event, establishing standing for Contention E would involve the same showing required for the other contentions: a showing of "a concrete and particularized injury" (in this proceeding, increased risk of water contamination) that is "fairly traceable to the challenged action" (*i.e.*, NRC approval of a license amendment that would allow the proposed mining at the new expansion site), "likely to be redressed by a favorable decision" (*i.e.*, denial of the applied-for license amendment). *See Crow Butte*, LBP-08-6, 67 NRC at 271; *see also id.* at 276-89.

We would further observe that requiring a separate showing of standing for each ground or contention would, apart from not being required under relevant law, thus be duplicative, as well as add significantly to delays and inefficiencies in NRC adjudicatory proceedings, a concern that has been a central one for the Commission over the years. *See*, *e.g.*, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004), in which the first words of the Commission's Statement of Considerations for the new 10 C.F.R. Part 2 rules were: "The Nuclear Regulatory Commission (NRC) is amending its regulations concerning its rules of practice to make the NRC's hearing process more effective and efficient."

Act]."[54] Where situations addressed in Federal Court case law on Article III standing are not comparable to that in an NRC proceeding, it is clearly not appropriate to apply them in the NRC proceeding. We find Applicant's arguments regarding Intervenors' standing to raise and litigate Contention E to be without merit, and accordingly move on to consider the admissibility of the contention under the contention admissibility provisions of 10 C.F.R. § 2.309(f)(1).

B. Ruling on Admissibility of Contention E

As noted above, at this point Contention E deals more with the significance than the disclosure of the foreign ownership of the Applicant, given Applicant's acknowledgment of its ownership by Cameco.[55] We begin our analysis, however, with the contention as originally stated and supported by Intervenors in their Petition, and address in the course of our analysis questions of significance, consequences and impacts.

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[54] 69 Fed. Reg. at 2200. Section 189a of the Atomic Energy Act concerns NRC adjudicatory hearings and includes the requirement that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239a(1)(A). The context for the Commission's quoted language in the text is the following:

> While Article III of the Constitution does not constrain the NRC hearing process, our hearings therefore, are not governed by judicially-created standing doctrine, *see Envirocare of Utah, Inc. v. NRC*, 194 F.3d 72 (D.C. Cir. 1999), the Commission nonetheless has generally looked to judicial concepts of standing where appropriate to determine those interests affected within the meaning of Section 189.a. of the AEA. *Commonwealth Edison Co*. (Zion Nuclear Power Station, Units 1 and 2), CLI-99-04, 49 NRC 185, 188 (1999), citing *Portland Gen. Elec. Co*. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976). The Commission contemplates no change in this practice.

69 Fed. Reg. at 2200.

[55] *See supra* text accompanying n.6; *infra* text accompanying n.78.

1. Summary of Contention and Basis

In Contention E Intervenors allege:

> CBR Fails to Mention It is Foreign Owned by Cameco, Inc. So All The Environmental Detriment and Adverse Health Impacts Are For Foreign Profit and There Is No Assurance The CBR Mined Uranium Will Stay In US for Power Generation.[56]

Intervenors in support of this contention assert, as we recounted in LBP-08-06,[57] that Applicant seeks to expand its operations on the basis that the uranium it produces is needed to fulfill U.S. demand, but that the Applicant's "Canadian owners may divert the Uranium products to non-US customers such as China, India, Pakistan, North Korea or possibly Iran."[58] Intervenors claim that Cameco has owned Crow Butte Resources since 2000,[59] and also "runs operations in Canada and Kazakstan and . . . sells Uranium products to other non-US buyers."[60] Intervenors contend that Applicant's foreign ownership is "key" to the determination whether the Applicant's current and proposed operations are within "the best interests of the US general public," and that this issue is thus material to the findings that must be made regarding the Application at issue.[61] Alleging that Applicant deliberately omitted references to foreign ownership in its application "in order to give the mis-impression that CBR's Uranium mining operations are

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[56] Reference Petition at 2, 24. We note that the Reference Petition is a consolidation of the original, largely identical Petitions filed by the various Petitioners, including the current Intervenors. *See* Request for Hearing and/or Petition to Intervene for Owe Aku, Bring Back the Way (Nov. 12, 2007); Request for Hearing and/or Petition to Intervene for Western Nebraska Resources Council (Nov. 12, 2007); Request for Hearing and/or Petition to Intervene for Debra L. White Plume (Nov. 12, 2007). (This list does not include the requests of additional petitioners whom we found did not have standing in this proceeding.)

[57] *Crow Butte*, LBP-08-6, 67 NRC at 334-39.

[58] Reference Petition at 24-25.

[59] *Id.* at 25.

[60] *Id.*

[61] *Id.*

somehow profitable to US interests," Intervenors suggest that, as a Canadian-owned company, Crow Butte's operations are "clearly for the profit of foreign interests."[62]

Among several sections of the Application from which Intervenors provide quotations in support of Contention E are sections 1.1.1, 1.2 and 2.1.2 of the Environmental Report (ER). From the first of these, the following quotation is provided:

> ER 1.1.1 Crow Butte Uranium Project Background
> The original development of what is now the Crow Butte Uranium Project was performed by Wyoming Fuel Corporation, which constructed a research and development (R&D) facility in 1986. The project was subsequently acquired and operated by Ferret Exploration Company of Nebraska until May 1994, when the name was changed to Crow Butte Resources, Inc. (CBR). This change was only a name change and not an ownership change. CBR is the owner and operator of the Crow Butte Project.[63]

The Intervenors also provide the following quotation, which consists of language found in both ER §§ 1.2 and 2.1.2:

> The Crow Butte Project (including the North Trend Area) represents an important source of new domestic uranium supplies that are essential to provide a continuing source of fuel to power generation facilities.[64]

Finally, Intervenors state in support of Contention E that the Applicant provides no information in its Application regarding the "chain of possession of this nuclear source material or who the buyers are and where it may end up or how it may be ultimately used."[65]

2. Satisfaction of 10 C.F.R. § 2.309(f)(1)(i), (ii), (v)

We are required to assess the admissibility of Contention E under the requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi). We find at the outset that the contention, supported in the Petition as summarized above, meets the first two requirements in question, that Intervenors provide (i)

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[62] *Id.* at 24-25.

[63] *Id.* at 25.

[64] *Id.* at 26.

[65] *Id.*

a "specific statement of the issue of law or fact to be raised or controverted"; and (ii) a "brief explanation of the basis for the contention."[66] The contention obviously involves combined issues of law and fact, relating to whether or not Crow Butte Resources is in fact foreign-owned; if so, whether this was in fact — and should legally have been — disclosed; and what the factual impact and legal significance of such alleged foreign ownership and failure to disclose are and would be, should the Application be granted. The contention is specifically stated, and Intervenors provide the requisite "brief explanation" of its basis.

We also find that the contention and support provided for it meet the requirement of 10 C.F.R. § 2.309(f)(1)(v), that petitioners "provide a concise statement of the alleged facts *or* expert opinions which support the [petitioners'] position on the issue and on which the [petitioners intend] to rely at the hearing, together with references to the specific sources and documents on which the [petitioners intend] to rely to support its position on the issue."[67] Although Intervenors provide no expert opinions in support of the contention, this is not required,[68] and Intervenors clearly provide a concise statement of alleged facts that support the contention. As to sources and documents, Intervenors rely on various parts of the Application itself, thus also satisfying part of the requirements of 10 C.F.R. § 2.309(f)(1)(vi), insofar as it mandates "references to specific portions of the application (including the environmental report and safety report)."

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[66] 10 C.F.R. § 2.309(f)(1)(i), (ii).

[67] *Id.* § 2.309(f)(1)(v) (emphasis added).

[68] *See*, *e.g.*, Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989), in which the Commission explained that the requirement at § 2.309(f)(1)(v) "does not call upon the intervenor to make its case at [the contention] stage of the proceeding, but rather to indicate what facts *or* expert opinions, *be it one fact or opinion* or many, of which it is aware at that point in time which provide the basis for its contention." *Id.* (emphasis added).

3. Satisfaction of 10 C.F.R. § 2.309(f)(1)(iii), (iv), (vi)

With regard to the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi), that petitioners must "[d]emonstrate that the issue raised in the contention is within the scope of the proceeding" and "material to the findings the NRC must make to support the action" at issue, and that they must "provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact," we note that the NRC Staff's and the Applicant's initial objections to the contention primarily concerned questions of scope and materiality.[69] In this regard, in LBP-08-6 we refrained from ruling on Contention E, to allow the parties to brief certain related issues further.[70] We observed that the questions before us included "whether foreign ownership of the Applicant would, under [10 C.F.R.] Part 40, including § 40.32(d), have an impact on or endanger the common defense or security of the United States, so as to bring into question the propriety of granting the sought license amendment."[71]

10 C.F.R. § 40.32 concerns the requirements for issuance of a license relating to source material such as that at issue herein. Under 10 C.F.R. § 40.45, in a license amendment (or renewal) proceeding the "applicable criteria set forth in § 40.32" are to be applied in considering

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[69] *See* NRC Staff Combined Response in Opposition to Petitioners' Requests for Discretionary Intervention and Petitions for Hearing And/or to Intervene of Debra White Plume, Thomas Cook, Owe Aku/Bring Back the Way, Chadron Native American Center, High Plains Development Corporation, Slim Buttes Agricultural Development Corporation, and Western Nebraska Resources Council (Dec. 7, 2007) at 43 [hereinafter Staff 12/7/07 Response]; Tr. at 353; *Crow Butte*, LBP-08-6, 67 NRC at 335-36.

[70] *Crow Butte*, LBP-08-6, 67 NRC at 339.

[71] *Id.* We also noted that there was a question whether issuance of the requested license amendment would violate 10 C.F.R. § 40.38. *Id.* The NRC Staff has correctly pointed out that it would not, given that § 40.38 was "promulgated to implement the USEC Privatization Act . . . which amended the Atomic Energy Act of 1954 . . . and applies exclusively to uranium enrichment facilities." NRC Staff's Response to Board's Order of April 29, 2008 (May 23, 2008) [hereinafter Staff 5/23/08 Response] at 2; *see also* Applicant 5/23/08 Brief at 3-5.

an application. According to Staff, § 40.32(d) is among those it considers to be "applicable" in reviewing a license amendment application.[72]

Section 40.32(d) includes as a requirement that "issuance of the license will not be inimical to the common defense and security or to the health and safety of the public." This is relevant, first, because Intervenors in support of Contention E have urged from the start that Applicant's foreign ownership is "key" to the determination whether the Applicant's current and proposed operations are within "the best interests of the US general public," and that this issue is thus material to the findings that must be made regarding the Application at issue.[73]

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[72] Staff 5/23/08 Response at 6; *but see also* Tr. at 479-80. Regarding Applicant's questions about the Board's role with respect to legal issues and "uncover[ing] arguments and support never advanced by the petitioners themselves," Applicant 5/23/08 Brief at 5, we note that Intervenors did not themselves cite 10 C.F.R. § 40.32(d) in support of Contention E in their original petition. As noted *infra*, however, they do in their petition argue in support of the contention that "understanding the foreign ownership of [Crow Butte Resources] is key" to the determination Intervenors contend the NRC must make, regarding whether Crow Butte's current and proposed operations are "in the best interests of the US general public." Reference Petition at 25. Thus the Board was led to consider relevant law and rules relating to foreign ownership, particularly under 10 C.F.R. Part 40, as well as to whether at least the proposed expansion site would be in the "best interests of the public" as in effect defined at § 40.32, including subsection (d) thereof.

In this regard, we note that the NRC rule on contention admissibility nowhere requires petitioners to cite any specific law or regulation in support of a contention. (Thus the Staff's argument that Intervenors cite no law or regulation requiring consideration of the "chain of possession" of uranium mined by Crow Butte, Staff 12/7/07 Response at 44, is also without merit.) Licensing Boards, however, in deliberating on the admissibility of submitted contentions often research the law relevant to those contentions and issues raised in them, and it is not at all out of the ordinary for judges in their orders to discuss the law and regulations that may be relevant to issues raised in contentions, whether in ultimately admitting or denying them, or, as we did with regard to Contention E, in permitting the parties to brief such potentially relevant legal issues further before making a final ruling, so that all parties have full opportunity to make any and all legal arguments that might be pertinent to the Board's final determination on admissibility of the contention. Researching and considering the law that may be related to issues raised by parties is a fundamental part of the role of judges, and indeed judges would be remiss in their duties if they did not do this with respect to issues that may obviously have a legal aspect to them.

[73] *See* Reference Petition at 25. Intervenors have also cited section 69 of the Atomic Energy Act, which provides that "[t]he Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for

Second, as we noted in LBP-08-6, the phrase "common defense and security" has been interpreted in NRC case law as referring to "the absence of foreign control over the applicant."[74] Although this interpretation addressed the phrase as used at 10 C.F.R. § 50.12(a), the use of the exact same phrase, "common defense and security," at § 40.32(d), with no proviso as to a different meaning, leads to a conclusion that the same meaning would apply – or at the very

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such purpose would be inimical to the common defense and security or the health and safety of the public." 42 U.S.C. § 2099. Intervenors assert that this is the statutory source for § 40.32(d) and argue that it is dispositive authority on this issue. Petitioners' Brief Concerning Contention E and Subpart G (May 23, 2008) at 12 [hereinafter Petitioners 5/23/08 Brief] (citing 42 U.S.C. § 2099). As recently noted by another licensing board, it is, of course, quite "proper for a reply to respond to the legal, logical, and factual arguments presented in answers, so long as new issues are not raised." *Northern States Power Co*. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC __ , __ (slip op. at 17) (Dec. 5, 2008).

[74] *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), LBP-84-45, 20 NRC 1343, 1400 (1984), *aff'd in part, rev'd in part, and remanded*, ALAB-800, 21 NRC 386 (1985). We also noted, regarding the phrase, "common defense and security" as used in several parts of the Atomic Energy Act, that the D.C. Circuit Court of Appeals had suggested that there was "internal evidence [in] the Act" that

> Congress was thinking of such things as not allowing the new industrial needs for nuclear materials to preempt the requirements of the military; of keeping such materials in private hands secure against loss or diversion; and of denying such materials and classified information to *persons whose loyalties were not to the United States*.

Siegel v. AEC, 400 F.2d 778, 784 (D.C. Cir. 1968) (emphasis added).

Applicant has cited another D.C. Circuit case, *NRDC v. NRC*, 647 F.2d 1345 (D.C. Cir. 1981), for the proposition that "in the absence of unusual circumstances, the Commission need not look beyond the non-proliferation safeguards in determining whether the common defense and security standard is met." Applicant 5/23/08 Brief at 8-9 (citing *NRDC v. NRC*, 647 F.2d at 1363). But *NRDC* involved the issue of "whether and to what extent 'effective control' of nuclear exports requires the [NRC] to consider projected health and safety impacts associated with an exported reactor in the recipient foreign country," 647 F.2d at 1346, not whether foreign ownership itself may be relevant to "common defense and security" considerations in cases not involving exports *per se*; exports themselves, as in *NRDC*, of course necessarily *already* concern transport to a foreign country or countries. *See*, *e.g.*, *id.* at 1363, where the Court agreed with a Congressional Committee report statement that "[i]n the absence of unusual circumstances the committee believes that any proposed export meeting the (nonproliferation safeguards) criteria set forth in subsection 127a. and, [sic] subsection 128a. [of the AEA], would also satisfy the common defense and security standard." We therefore do not find that this ruling of the Court is inconsistent with the Court's ruling in *Seigel* or that of the licensing board in *Long Island Lighting* to the extent that foreign ownership would be irrelevant in this proceeding.

least that such an interpretation is arguable, particularly from the standpoint of contention admissibility.

The preceding considerations suggest that the issue of foreign ownership is not, contrary to Staff and Applicant arguments,[75] immaterial in this proceeding, and that Contention E is within the scope of this proceeding.

We recognize at this point that, although Applicant initially denied the bulk of Intervenors' allegations regarding foreign ownership of Crow Butte,[76] and admits that it did not disclose the actual ownership of Crow Butte anwhere in the Application,[77] it subsequently acknowledged that Cameco is in fact a Canadian-owned company that is the ultimate owner of Applicant Crow Butte Resources.[78] Applicant also states that the chain of ownership of uranium mined at the

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[75] *See*, *e.g.*, Staff 12/7/07 Response at 43-44; Staff 5/23/08 Response at 3; Tr. at 353; Applicant 5/23/08 Brief at 1, 8-9; Applicant's Consolidated Response Regarding Foreign Ownership and Hearing Procedures (June 9, 2008) at 2 [hereinafter Applicant 6/9/08 Response]; Applicant's Response to NRC Staff's Response to Board's Order of August 5, 2008 (Aug. 29, 2008) at 2, 17 [hereinafter Applicant 8/29/08 Response].

[76] *See* Response of Applicant, Crow Butte Resources to Petitions to Intervene filed by Ms. Debra L. White Plume, Chadron Native American Center, Inc., High Plains Community Development Corporation, Thomas Kanatakeniate Cook, Slim Buttes Agricultural Development Corporation, Western Nebraska Resources Council (Dec. 6, 2007) at 5 [hereinafter Applicant 12/6/07 Response].

[77] *See* Tr. at 477-78.

[78] Applicant 5/23/08 Brief at 2. According to Applicant:

> The land (fee and leases) at the Crow Butte facility is owned by Crow Butte Land Company, which is a Nebraska corporation. All of the officers and directors of Crow Butte Land Company are U.S. Citizens. Crow Butte Land Company is owned by Crow Butte Resources, Inc., which is the licensed operator of the facility. Crow Butte Resources, which does business as Cameco Resources, is also a Nebraska corporation. All of its officers are U.S. citizens, as are 2/3 of its directors. Crow Butte Resources is owned by Cameco US Holdings, Inc., which is a U.S. corporation registered in Nevada. Again, all of the officers of Cameco US Holdings are U.S. citizens, as are 2/3 of the directors. Cameco US Holdings is held by Cameco Corp., which is a Canadian corporation. Cameco Corp. is publicly traded on both the Toronto and New York Stock Exchanges. According to the most recent information available on institutional and retail ownership, total U.S. shareholdings in Cameco are 52%. Canadian ownership

Crow Butte existing and proposed sites would be subject to the Nuclear Non-Proliferation Treaty, of which Canada is a signatory,[79] and Canada's safeguards agreement and protocol providing the International Atomic Energy Agency (IAEA) with "the right and obligation to monitor Canada's nuclear related activities and verify nuclear material inventories and flows into Canada."[80] We note as well that both Staff and Applicant point out that in 1998 Crow Butte reported to the NRC the imminent purchase of shares by Cameco, which the NRC approved.[81]

> accounts for 39% of outstanding shares.
>
> . . . .
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> Cameco is the leading U.S. producer of uranium. *See Energy Information Administration,* U.S. Department of Energy, http://www.eia.doe.gov (2008). Crow Butte and Smith Ranch-Highland, which both provide uranium to Cameco, have accounted for the vast majority of all U.S.-produced uranium for nearly a decade. *Id.* Cameco is also the largest supplier of uranium to U.S. utilities. More than half of Cameco's global sales in 2007 were to U.S. customers, which include, among many others, the Omaha Public Power District in Nebraska and the U.S. Government (Tennessee Valley Authority). Ultimately, Cameco supplied approximately 32% of all U.S. uranium requirements in 2007. This uranium accounts for more than 5% of all electricity generated in the United States.

Id. at 2-3. We note Intervenors' challenge of Cameco's statement regarding "total U.S. shareholdings in Cameco [being] 52%," Petitioners' Reply to Applicant's Brief Regarding Foreign Ownership and Subpart G (June 9, 2008) at 3 [hereinafter Petitioners 6/9/08 Reply], which would be among the factual issues for determination in any hearing granted on Contention E.

[79] Tr. at 354.

[80] Citations to International Agreements (Jan. 30, 2008) at 2. Of course, these are all merits issues, to be determined ultimately in any hearing on Contention E.

[81] *See* NRC Staff Response to Petitioners' Brief on Foreign Ownership and Subpart G (June 9, 2008) at 7 [hereinafter Staff 6/9/08 Response]; Applicant 6/9/08 Response at 8-9 ("On May 13, 1998, Crow Butte notified the NRC 'pursuant to 10 CFR § 40.46' of an upcoming change in the ownership of the shareholders of Crow Butte Resources. In that letter, Crow Butte informed the NRC that Cameco had agreed to purchase all of the shares of Uranerz U.S.A., Inc. – 79 of 100 shares, which would give Cameco a controlling ownership interest in Crow Butte. The letter also sought NRC confirmation that the notification satisfied 10 C.F.R. § 40.46. On June 5, 1998, the NRC responded, notifying Crow Butte that 'the NRC staff finds the proposed change in shareholder ownership to be acceptable' and consenting to the change. The NRC also determined that no amendment to Crow Butte's source material license was necessary and attached a Technical Evaluation Report assessing the proposed change in ownership." (Citations omitted.)); *see also* Tr. at 519.

With regard to disclosure of the preceding facts in the Application itself, Staff and Applicant assert that 10 C.F.R. Part 40 does not require a statement of ownership in an application.[82] But, as Intervenors point out, 10 C.F.R. § 40.9(a) requires that "[i]nformation provided to the Commission by an applicant for a license or by a licensee" be "complete and accurate in all material respects."[83] Intervenors also cite Section 182 of the Atomic Energy Act[84] for a requirement that applicants for licenses state their citizenship.[85] As the Crow Butte license renewal licensing board has pointed out, the Commission has interpreted this requirement to include, for corporate applicants, place of incorporation, citizenship of directors and principal officers, and whether "owned, controlled or dominated by . . . a foreign corporation . . . ."[86]

If Contention E concerned only the issue of disclosure of Crow Butte's foreign ownership, and no questions of the significance or impact of such ownership, it might be argued that Applicant could easily cure any possible defect in its Application by amending it with respect to its actual ownership and citizenship and thereby dispose of the contention.

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[82] *See*, *e.g.*, Staff 6/9/08 Response at 6; Tr. at 478.

[83] Petitioners 5/23/08 Brief at 15 (internal citations omitted); Tr. at 457. We note, regarding § 40.9, that the Licensing Board in the Crow Butte license renewal proceeding observed, in response to arguments that the section comes into play only in enforcement proceedings, that this did not place the issue beyond consideration in a licensing proceeding, and we agree. *See Crow Butte Resources, Inc.* (License Renewal for the In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC __, __ (slip op. at 63) (Nov. 21, 2008). We agree with this assessment. It would make no sense, in a proceeding on a license amendment application, to ignore inaccuracies in the application in determining whether to grant the application.

[84] 42 U.S.C. § 2232.

[85] Petitioners 5/23/08 Brief at 13. During oral argument, Intervenors also urged consideration of the public notice aspects of what is in an application — *i.e.*, how the public is notified of such information, so that members of the public can effectively decide whether and what issues to raise regarding any such application. *See* Tr. at 572-73.

[86] LBP-08-24, 68 NRC at ___ (slip op. at 65) (citing 64 Fed. Reg. 52,355, 52,357 (Mar. 1, 1999); 64 Fed. Reg. 44,635, 44,649 (Aug. 16, 1999); 10 C.F.R. §§ 50.33(3), 52.16, 76.33(a)(2)).

Intervenors have, however, alleged more than a mere lack of disclosure of Applicant's foreign ownership. They have made factual allegations concerning various impacts of such ownership, including the potential for exports to countries other than Canada, and alleged motivation of the Canadian owners to put their own profits above environmental and health concerns in the U.S.[87]

In addition, Intervenors make various legal arguments in response to Staff and Applicant. For example, they point out that under 10 C.F.R. § 40.2, relevant provisions of Part 40 "apply to all persons in the United States," and not to those outside the United States, even those in Canada.[88] We note that it came out in our site visit that, whatever Crow Butte mine personnel may do with regard to NRC requirements, ultimate control of the Licensee/Applicant appears to rest with Cameco personnel, who are based in Canada, not the United States.[89]

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[87] *See supra* § II.B.1.

[88] *See* Petitioners 5/23/08 Brief at 14. Regarding this and other legal arguments of the Intervenors as summarized herein, we find that none are the sort of additional support for a contention that "cannot be introduced in a reply brief . . . unless the petitioners meet the late-filing criteria set forth in 10 C.F.R. § 2.309(c)(f)(2)." *See* Staff 6/9/08 Response at 3 (citing *In re Nuclear Management Co., L.L.C.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006)). To the contrary, all respond either to arguments of Staff and/or Applicant, or to our request for further briefing on specified issues that arose out of Staff and Applicant's objections to Contention E, regarding scope and materiality questions. *See supra* n.73.

To the extent that any legal issues not specifically addressed herein may later arise in the proceeding, we leave them to be addressed, as and to the extent called for, at a later date. Staff has informed us that they do not expect to complete the final technical evaluation of the Application until May 2009, and the final environmental assessment until June 2009. *See* NRC Staff's Response to Board's Order of August 5, 2008 (Aug. 15, 2008) at 7 [hereinafter Staff 8/15/08 Response]. Therefore, at this point there is no urgency regarding any determinations in this regard. Further, we note that, to the extent required, Applicant could easily amend its Application to correct any deficiencies relating to stating its ownership and citizenship, leaving at such point only the matter of the significance and impact of foreign ownership to be determined.

[89] This site visit was conducted with all parties present, on July 24, 2008, and consisted of a verbal presentation by a Crow Butte facility manager and a tour of both the current and proposed sites, with Crow Butte personnel available to answer questions, although without any court reporter present, as is normally the case with such site visits. *See* Licensing Board Order (Following Up on Matters Addressed at May 8, 2008, Telephone Conference, and Raised by Petitioner Debra White Plume) (May 14, 2008) (unpublished), in which the Board cautioned that "the Board and all Parties shall make every effort to assure that no *ex parte* communications are engaged in, even inadvertently." *Id.* at 2.

While the ultimate findings of fact regarding such control remain for another day, after any hearing on Contention E, these circumstances highlight the significance of the question of the extent to which it is realistic to expect that relevant regulatory requirements could be enforced with Crow Butte if the need ever arose, in light of § 40.2.[90] And this would in turn seem to bring into question whether the "applicant's proposed . . . procedures are adequate to protect health and minimize danger to life or property," under § 40.32(c). These considerations, as well as Intervenors' factual allegations regarding the impacts and significance of Applicant's foreign ownership, also counter, and effectively render irrelevant in this proceeding, Staff's claim that foreign ownership *alone* is insufficient to support a determination that issuance of the requested license amendment would be "inimical to the common defense and security."[91] More than the mere fact of foreign ownership is obviously at issue in Contention E.

Before reaching our ultimate conclusion on the admissibility of Contention E, however, we consider two additional, related arguments of the NRC Staff and Applicant. First, they maintain that the foreign ownership of the Applicant is not relevant in this proceeding, because the proceeding is a license *amendment* proceeding, and the amendment application involves no "change in ownership" or proposal to export any source material; second, they urge that any

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[90] *See* Tr. at 458, for examples pointed out by Intervenors in oral argument, including meetings of the Cameco board in Canada regarding Crow Butte.

[91] Staff 5/23/08 Response at 4. We note that Staff has cited no authority for its proposition, and in oral argument agreed that, if the foreign country were one that might pose some national security risk, this might have some impact on this proceeding such that Staff would bring this to our attention. Tr. at 529-30. Staff's general position with regard to the fact of foreign ownership alone, however, has been that any issues of national security related to foreign ownership should be dealt with in an enforcement proceeding, and that foreign ownership is outside the scope of this license amendment proceeding. *See*, *e.g.*, *Id.* at 524-30, 567-68. And Applicant has maintained that, even if the owner were a national from a country that posed a security risk to the U.S, this should not make any difference in this case. *Id*. at 486-87.

questions about any eventual destinations of any uranium mined by Crow Butte at its expansion site will be dealt with in future export license proceedings.[92]

Regarding Staff's and Applicant's arguments centering around the fact that this proceeding comes to us as a license amendment proceeding,[93] there is indeed precedent for the principle that in license amendment proceedings matters not part of the amendment at issue are not within scope. Before addressing certain law cited to us in this proceeding, however, we note the somewhat random nature of how this case came to us as a license amendment proceeding rather than as a new license application, notwithstanding the fact that the North Trend Expansion Project is not contiguous with the originally-licensed mining site.

When asked what standards are used in determining whether to treat an application as one for a license amendment or a new license, Staff stated that it was "currently looking at the issue."[94] Further, according to Staff, proximity "is a factor when we're looking at whether or not we're going to do an amendment for these particular types of facilities or . . . a new license";[95] and "the policy of the NRC with regard to satellite facilities and amendments goes all the way back . . to the 80's."[96] Staff provided no written policy or citation to any authority for this, however. Staff indicated that proximity is not the only factor in such determinations, and that in several instances it had issued amendments in similar circumstances, including one in which

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[92] *See*, *e.g.*, Staff 5/23/08 Response at 3-6; Applicant 5/23/08 Brief at 7-8.

[93] *See*, *e.g.*, Staff 5/23/08 Response at 3 ("the amendment application is requesting approval to conduct an addition in-situ leach uranium recovery operation at another location" and "does not involve a change of ownership"); Applicant 5/23/08 Brief at 7-8 ("The licensing review for an amendment is not a forum for reassessing issues that were resolved in the initial licensing review"; "[a]ny challenge related to the ownership of Crow Butte is an impermissible challenge to an activity already permitted under the existing license").

[94] Tr. at 538.

[95] *Id.* at 539.

[96] *Id.*

the new site was 100 miles from the original site, but that in that case as in this proceeding, "only the first part of the in situ leach recovery process is occurring at [the new] facility and then the rest of it happens at the main facility."[97] It has been the Staff's practice for "a number of years" to determine whether to treat an application as a new license or a license amendment,[98] but the standards for how this is accomplished have "not been codified," and Staff counsel was "not in a position to comment on it publicly"[99] — all that exists formally, relating to any such standards, is apparently "the regulatory framework" of 10 C.F.R. Part 40.[100] In light of these Staff statements, while we do not rest our decision herein on these circumstances, we cannot help but observe that Staff's and Applicant's arguments concerning the status of this proceeding as a "license amendment proceeding" are less credible that they might be, were there existing published standards on how it is determined whether a proceeding should be considered as an amendment application or a new license application, and were the expansion site part of the same piece of property and not separated by several miles distance from the original site.

Staff also, however, cites in support of its "license amendment" and "export license" arguments two Commission decisions, *In re Kerr-McGee Corp.* (West Chicago Rare Earths Facility)[101] and *In re Curators of the University of Missouri*.[102]

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[97] *Id.* at 540; *see id*. at 540-42.

[98] *Id*. at 543.

[99] *Id.* at 542; *see also id.* at 544-45.

[100] *Id.* at 545.

[101] Staff 5/23/08 Response at 4 (citing *In re Kerr-McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232 (1982)).

[102] *Id.* (citing *In re Curators of the Univ. of Missouri*, CLI-95-1, 41 NRC 71, 165 (1995)). We note at this point Intervenors' response to Staff, to the effect that the *University of Missouri* and *Kerr-McGee* cases are both pre-9/11 cases. *See* Tr. 456-57. While reliance on this circumstance is not necessary to our decision herein, we agree that issues of national security have obviously taken on greater weight and significance in the wake of the attacks of

Kerr-McGee[103] involved a Part 40 source materials license for an inactive thorium milling facility, a requested amendment that would permit certain demolition and storage activities, and various challenges raised by the City of Chicago, none of which concerned foreign ownership or any related matters.[104] In a footnote to language describing the NRC Staff's grant of the requested amendment, the Commission quoted from the requirements of § 40.32 for granting such amendments, stating in passing that it "should be noted, however, that in this instance, which involves *no concern over* import or export of materials, common defense and security considerations under section 40.32(d) are not implicated."[105] The present case, involving as it does definite concerns that have been raised over foreign ownership and export of materials, is clearly distinguishable from the *Kerr-McGee* case, and to deny admission of Contention E based on the dicta cited by Staff would be inappropriate.

University of Missouri involved an application for amendments to two licenses, one relating to special nuclear material and source material and one relating to "Broad Scope Byproducts," that would authorize possession and use of uranium and certain other elements, as well as the conducting of certain basic research on the chemistry of these elements in their pure form.[106] The ultimate objective of the research was to develop ways of separating long-lived from shorter-lived radioactive elements in spent fuel so as to reduce the volume of radioactive waste required to be stored in high-level nuclear waste disposal facilities and allow the majority of the waste to be stored until the shorter-lived elements could decay to low-

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September 11, 2001.

[103] We note that the *Kerr-McGee* case was also cited by Applicant in its 5/23/08 Response at 8.

[104] *Kerr-McGee*, CLI-82-2, 15 NRC at 234-35, 242.

[105] *Id.* at 238 n.3.

[106] *Univ. of Missouri*, CLI-95-1, 41 NRC at 86, 88.

enough levels of radioactivity to permit lower-cost disposal as low-level waste.[107] Among the concerns raised by intervenors in the case was the contention "that the University's research project would, if successful, adversely affect efforts to restrain nuclear proliferation," by leading to "commerce in large amounts of separated weapons-usable materials."[108]

The Commission in *University of Missouri* upheld part of the presiding officer's rejection of the intervenors' argument, finding, as noted by Staff, that they were "not entitled . . . to litigate this area of concern unless the specific 'common defense and security' risk asserted . . . is reasonably related to, and would arise as a *direct* result of, the specific license amendments that the University asks the Commission to approve in this proceeding."[109] Again, however, the case before us is also distinguishable from the *University of Missouri* case. As the Commission pointed out there, the University's proposed research did not "lead 'directly' to nuclear weapons proliferation," but rather was "many steps removed from even the possibility of such proliferation."[110] The Commission continued:

> First, even if the University's initial research is successful, Congress or DOE may still choose (for policy, economic, or other reasons) not to authorize the additional research necessary to render the process commercially viable. Second, if such a second round of research is authorized, it still may not be successful. Third, if the second round of research is both authorized and successful, the federal government and industry may still choose not to use the process, again due to policy, economic, or other considerations (such as the availability of a more preferable means of nuclear waste disposal). And fourth, if the federal government and industry do choose to use the process, the government can still regulate the use and distribution of the process so as to preclude the nuclear weapons proliferation that the Intervenors fear. Only at this fifth stage would the Intervenors' concerns about proliferation and safeguards become *ripe for concern*. We are loath to halt basic research in its tracks on the purely speculative ground that its fruits may someday be put to improper use.

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[107] *Id*. at 88.

[108] *Id.* at 163-64.

[109] *Id.* at 165; *see also* Staff 5/23/08 Response at 4.

[110] *Univ. of Missouri*, CLI-95-1, 41 NRC at 165.

> . . . . It will be up to future policymakers to decide whether and how to use the results of the University's research. The policymakers' future decision may be the proximate cause of the Intervenors' concerns, but the basic research itself cannot be. The connection is simply too *remote and speculative*, being premised upon the future third-party activities that are unrelated to the specific activities authorized by the license amendments. Consequently, we conclude . . . that the Intervenors' "proliferation" area of concern is not a direct consequence of the proposed license amendments (or the Commission's approval thereof) . . . .[111]

In this proceeding, by contrast, there are not, for example, multiple rounds of research intervening between this proceeding and any export license proceeding or transfers of material outside the U.S., nor are such transfers at all speculative, given that Applicant has stated that export licenses have been obtained in the past[112] and it appears that this will continue in the future if the Application at issue is granted.[113]

Moreover, if we were to follow the arguments of the NRC Staff and the Applicant, Intervenors' concerns would *never* become "ripe for concern,"[114] because it appears that there is

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[111] *Id*. at 165-66 (emphasis added).

[112] Tr. at 447.

[113] *See*, *e.g.*, Applicant 8/29/08 Response at 16 ("In practice, *many* shipments of natural uranium directly from Crow Butte to a conversion facility in Canada are authorized under an export license issued to RSB Logistics Services. *See* Export License XSOU8798, dated March 4, 2004 (listing Crow Butte as one of several 'suppliers' of natural uranium)." (Emphasis added.)); Applicant's Reply to Petitioners' Brief on Export Licensing (Sept. 8, 2008) at 3 ("any export of natural uranium from Crow Butte *will likely be made* in accordance with an *existing or future* specific license [sic] issued in accordance with the process established in Part 110." (Emphasis added.)) These statements undermine Applicant's insistence elsewhere in the same filing that future export licenses are "speculative." *Id.* at 2; *see also* Tr. at 482-83.

[114] Regarding the ripeness question, in the 1978 Supreme Court *Duke Power* case — involving the constitutionality of the Price-Anderson Act, 42 U.S.C. § 2210; the standing of certain organizations and individuals living within close proximity to the then-planned Catawba and McGuire nuclear power plants to challenge the Act's limitation of liability on the part of the plant owners; and the ripeness of the issues for adjudication, 438 U.S. at 62-68 — the Supreme Court found it appropriate in deciding the ripeness question to look to whether "delayed resolution of . . . issues would foreclose any relief from the present injury suffered by appellees – relief that would be forthcoming if they were to prevail in their various challenges to the Act." *Id.* at 82; *see id*. at 81-82. (Again, the relief in this proceeding would be denial of the requested license amendment. *See supra* § II.A.) Although the ripeness doctrine as generally analyzed

essentially, as a practical matter, no way that they could ever show standing in any export proceeding, except as a discretionary matter by the Commission.[115] Discretionary standing

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by Federal Courts in addressing challenges of administrative agency actions may not be completely on point (*see*, *e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (the "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties")), consideration of it to the extent it is relevant and helpful guidance is appropriate in an adjudicatory proceeding such as this, in which consideration of federal case law and rules of procedure is not unusual in such circumstances. And the Supreme Court's statement in *Duke Power* would seem to fit the matters now at issue before us.

We note in this regard the Licensing Board's consideration, in the Crow Butte license renewal proceeding, of the D.C. Circuit Court of Appeals case, *Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251 (D.C. Cir. 2004), for the principle that in deciding ripeness questions, it is appropriate to assess "both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration." *Crow Butte*, LBP-08-24, 68 NRC at __ (slip op. at 32) (citing *NEI*, 373 F.3d at 1312-3 (quoting *Abbott Labs*, 387 U.S. at 149)). This is the same general question considered by the Court in *Duke Power*. *See* 438 U.S. at 81-82; *see also Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007), wherein the Supreme Court quoted the same language from the *Abbott* case.

[115] Based on Staff's and Applicant's arguments to the effect that all foreign ownership issues, including any issues in any way touching on future export of source materials from Applicant's proposed expansion site, would become ripe only in a 10 C.F.R. Part 110 export license proceeding, *see*, *e.g.*, Staff 5/23/08 Response at 5-6; Applicant 5/23/08 Brief at 9; Tr. at 445, 499, 523, we sought further information from Staff and the other parties regarding the export license process, including among other things "argument and supporting law relating to the standards for showing standing to participate in such a proceeding." Licensing Board Order (Confirming Matters Addressed at July 23, 2008, Oral Argument) (Aug. 5, 2008) at 2 (unpublished); *see also* Licensing Board Order (Regarding Matters to be Addressed in Further Filings by Parties) (Aug. 19, 2008) at 1-2 (unpublished) [hereinafter 8/19/08 Order]. We indicated that before ruling on the issue we wished to consider the parties' arguments on "whether the Intervenors could realistically assert their concerns about potential exports in any future export license proceeding. 8/19/08 Order at 3 (citing Tr. at 445-47, 495-98, 610-11). Neither Staff nor Applicant, in response to more than adequate opportunity to do so, has pointed us to any export case in which standing as of right was found for any petitioner, or otherwise shown how the current Intervenors or *any* petitioner might show standing as of right in any future export license proceeding. *See* NRC Staff's Withdrawal of its Motion for Reconsideration and Response to Petitioners' Motion to Strike NRC Staff's Motion for Partial Reconsideration and Response to the Board's Order of August 19, 2008, Exh. 1 (Sept. 16, 2008); Applicant 8/29/08 Response; Applicant 8/29/08 Reply.

In one case — the 1976 *Edlow International Company* case, CLI-76-6, 3 NRC 563 (1976) — while no standing as of right was found as to three organizations, *id.* at 574, 578, the Commission decided as a discretionary matter to hold an "open legislative type hearing," *id.* at 590; *see id*. at 589-91. And on one other occasion, while denying standing as of right and

involves the Commission deciding that a hearing "would be in the public interest" and/or that it "would assist the Commission in making the statutory determinations required by the Atomic Energy Act."[116] And this, of course, as pointed out by the Applicant, involves some level of subjectivity,[117] and is not the same as being accorded standing as of right, based on a petitioner's own interest in a proceeding.

We do not herein presume to speak to whether standing *should* be granted in any such export license proceedings. Indeed, we note that there appear to be special considerations in such proceedings, including interaction with the Executive Branch and other agencies, and time limits on decisions,[118] that may distinguish them from other NRC adjudicatory proceedings. But such distinctions may be viewed as actually mitigating in favor of allowing consideration of Intervenors' arguments on the *potential* for future exports[119] in this proceeding, as it is undisputed that they will likely follow, should the requested license amendment be granted. And the current proceeding is actually, to a virtual certainty, the *only* opportunity Intervenors will ever have to raise their concerns about foreign ownership of the Applicant.[120] In any event, we

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finding a discretionary hearing to be unwarranted, the Commission decided to permit interested participants to summarize their positions in a two and one-half hour public meeting, at which it also requested presentations from the Applicant and the Executive Branch. *See Transnuclear, Inc.* (Export of 93.3% Enriched Uranium), CLI-99-15, 49 NRC 366, 368 (1999).

[116] 10 C.F.R. §§ 110.84(a)(1), (a)(2); *see also* Applicant 8/29/08 Response at 7.

[117] *See* Applicant 8/29/08 Response at 9.

[118] *See NRDC*, 647 F.2d at 1349.

[119] By referring to the "potential" for future exports, we mean to emphasize that we do not see this proceeding as an occasion for litigation of issues such as might arise in an actual export license proceeding on specific exports, but expect rather that issues relating only to the *potential* for future exports would not be excluded merely on the basis that they concern possible future exports.

[120] We do not find persuasive Applicant's insistence that our questions concerning the realistic likelihood of Intervenors ever being granted standing in any future export license proceeding would result in "[l]icensing boards [needing] to determine, on a hypothetical basis,

look herein only to whether the concerns of the Intervenors, *regarding the foreign ownership* of the Applicant, and potential ramifications of that, including among other things potential future exports of source material, should be permitted at this time, in this proceeding. At a minimum, it would be inappropriate to *deny* the admission of Contention E based on arguments that such issues are appropriate for consideration only later, in any export license proceedings. Nor do Staff's and Applicant's arguments negate our earlier preliminary ruling that the foreign ownership issue is both material to and within the scope of this proceeding.

In conclusion, looking at all of the circumstances discussed above, we find that Intervenors have met the requirements of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi), by "[d]emonstrat[ing] that the issue[s] raised in the contention is within the scope of the proceeding" and "material to the findings the NRC must make to support the action" at issue, and "provid[ing] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." Whatever the ultimate outcome may be on Contention E, Intervenors have raised issues in the contention that are within the scope of this proceeding under 10 C.F.R. § 40.32 and material to the findings that must be made under § 40.32, which at subsection (d) directs us to consider whether issuance of the applied-for license amendment would be "inimical to the common defense and security." Clearly, if the applicant in even a license amendment proceeding were controlled by foreign nationals who presented some security risk to the United States, under § 40.32(d) this would be within the scope of the proceeding. It does not logically follow that the identity of the nation in question should affect

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whether . . . prospective petitioners are 'likely' to be admitted as a party" in any and all future cases regarding any and all "possible future applications." *See* Applicant 8/29/08 Response at 3. We address here *only* the arguments raised by Applicant itself, and the NRC Staff, to the effect that any concerns about foreign ownership and its future ramifications may only be considered in future *export license* proceedings. We do not speak to the particulars of any other proceedings involving "ripeness" or similar arguments, which would of course be addressed in those proceedings themselves, and would arise generally as a consequence of parties such as the Applicant asserting arguments in the nature of lack of ripeness.

the issue of scope. While such identity may be quite relevant on the merits of a contention relating to foreign ownership, this is not an appropriate basis to deny admission of such a contention.

Intervenors have also supported Contention E sufficiently to show a genuine dispute with the Applicant on material issues relating to its ownership and control by a foreign corporation arguably not subject to NRC regulations. Although, as noted above, there appears to be little dispute at this point that Applicant is in fact owned by Cameco, a Canadian corporation, and although particular individual facts related to this may not be in dispute, there is significant disagreement over the factual and legal implications and significance of these facts. Intervenors in Contention E allege not only the foreign ownership of Crow Butte and a failure to disclose this in the Application; they allege certain consequences of this, concerning environmental and health issues being secondary to "foreign profits," future exports, and inimicality to the national interest, related to Cameco's business relationships with other countries.[121] The parties clearly disagree as to the significance and impacts of ownership of the Applicant by Cameco. Thus, even assuming that the fact of foreign ownership is not in dispute, and even though Applicant could easily cure its prior admitted failure to disclose such ownership and arguably moot some issues related to requirements regarding such disclosure, very much in dispute are questions of the factual and legal ramifications of Cameco's ownership of Applicant Crow Butte Resources, Inc. And these include, in addition to the preceding alleged consequences of foreign ownership, the fundamental question of the ability to assure

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[121] As Applicant points out, it has been held that "there is no statutory or regulatory requirement that an applicant demonstrate any benefit from a requested license amendment." Applicant 5/23/08 Brief at 11 (citing *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 35 (2002)). But Applicant itself touts itself as producing uranium that "will benefit U.S. utilities," *id.*, and we do not rule out any relevance whatsoever of such questions, whatever the answers to them might be.

compliance with NRC rules relating to the proposed expansion site.[122] We therefore admit Contention E for litigation in this proceeding.

It may be that further briefing on the foreign ownership issue and certain related principles as discussed above may well be in order — perhaps in conjunction with a partial hearing on this issue alone, prior to a hearing on the hydrological questions at issue in Contentions A and B[123] but after the parties have at least commenced either Subpart L disclosure of relevant facts or Subpart G discovery. We will take this up in another prehearing conference to be held at an appropriate time, to be announced.

C. Intervenors' Request for Sanctions Against NRC Staff

As noted above, in our August 19 Order, among the questions we directed the parties to address was how an intervenor might show standing to participate in an export license proceeding.[124] Ten days later, NRC Staff filed a motion for partial reconsideration, asking the Board to reconsider its August 19 Order "to the extent that it necessitates the Staff to engage in

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[122] *See* 10 C.F.R. § 40.2. The possibility that Staff might separately initiate an enforcement proceeding (in any situation that it warranted to be appropriate) does not negate the relevance or materiality of the foreign ownership issue under § 40.32(d), which to the contrary places it squarely within the scope of the proceeding. And, as the Staff itself has pointed out, according to its Standard Review Plan for In Situ Leach Uranium Extraction License Application, NUREG-1569 (June 2003 Final Report) (ADAMS Accession No. ML003759117) [hereinafter NUREG-1569], it does "examine corporate management and control issues . . . even in the license amendment process." Tr. at 517-18; *see also* NUREG-1569 at 5-1 *et seq.*; Tr. at 510. Although reference to such a guidance document is not binding, in this case we find Staff's statements based on NUREG-1569 to elucidate our inquiry herein. Issues relating to whether persons in Canada might exert some control over the activities of the Applicant with regard to the proposed expansion site would seem to fall under the ambit of "corporate management and control issues."

[123] We expect that the matters at issue on Contention C, regarding consultation with tribal authorities regarding historic and prehistoric cultural resources may be resolved when the Staff undertakes its own consultations and evaluation, or that, alternatively, another contention may be filed based on whatever action the Staff takes or does not take. We leave this issue to be resolved after the Staff has taken action on the consultation issue.

[124] 8/19/09 Order at 3.

speculation regarding hypothetical situations . . . ."[125] On September 8, Intervenors moved to strike the Staff's motion for partial reconsideration on the grounds that it failed to meet the standards described in 10 C.F.R. § 2.323(e).[126] On September 16, 2008, NRC Staff voluntarily withdrew its motion for partial reconsideration, thereby mooting Intervenors' motion to strike.[127]

Now, Intervenors ask the Board to impose sanctions on NRC Staff for not withdrawing its motion for reconsideration earlier.[128] Intervenors point out that, just 12 days earlier, NRC Staff had refused Intervenors' request that it withdraw its motion, thereby forcing Intervenors to spend time and resources filing a motion to strike.[129] As a form of sanction, Intervenors want the Board "to order the NRC Staff to pay costs to Intervenors of $1,500 to make up for the complete waste of the time and resources of the Intervenors in preparing and filing the Motion to Strike . . . ."[130] NRC Staff, however, maintains that monetary sanctions are inappropriate because Staff did not

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[125] NRC Staff's Motion to For Partial Reconsideration and Response to Board's Order of August 19, 2008 (Aug. 29, 2008) at 1 [hereinafter Motion for Partial Reconsideration].

[126]Petitioners' Motion to Strike NRC Staff's Motion for Partial reconsideration Dated August 29, 2008 (Sept. 8, 2008) [hereinafter Motion to Strike].

[127] NRC Staff's Withdrawal of Its Motion for Reconsideration and Response to Petitioners' Motion to Strike NRC Staff's Motion for Partial Reconsideration and Response to the Board's Order of August 19, 2008 (Sept. 16, 2008) [hereinafter Withdrawal of Motion for Reconsideration].

[128] *See* Petitioners' Answer to NRC Withdrawal of Motion for Partial Reconsideration of August 19, 2008 Order (Sept. 22, 2008) [hereinafter Answer to Withdrawal of Motion for Reconsideration].

[129] *Id.* at 1-2.

[130] *Id.* at 3. In the alternative, Intervenors ask the Board to issue a "default order under [10 C.F.R. §] 320(a) in which the Board should order that the facts concerning Questions 1, 2 & 3 are as described by Petitioners in their briefing in response to the August 19th Order." *Id.* at 2.

"engage in prejudicial or bad-faith behavior" and, in any case, there is no statute authorizing the Board to order such a payment of appropriated funds.[131]

Regarding the Board's authority, the Commission has long recognized the Board's authority to impose sanctions on participants in a licensing proceeding. In a 1981 Statement, the Commission explained that "[w]hen a participant fails to meet its obligations, a board should consider the imposition of sanctions against the offending party."[132] In a later decision, the Commission affirmed that "[l]icensing boards have broad discretion to sanction willful, prejudicial, and bad-faith behavior."[133] But the Commission has never discussed the imposition of *monetary* sanctions, nor has any licensing board, to our knowledge, ordered monetary compensation from Staff to any intervenors.[134] NRC Staff points us to the Energy and Water Development Appropriations Act of 1993, by which Congress set limits on the NRC's use of appropriated funds,[135] and Section 502 of which instructs that NRC appropriations shall not "be

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[131] *See* NRC Staff's Response to Petitioners' Motion for Sanctions (Sept. 26, 2008), at 2-3 [hereinafter Response to Motion for Sanctions].

[132] *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-08, 13 NRC 452, 454 (1981).

[133] *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 7 (2001).

[134] Licensing boards have awarded payment of litigation fees and expenses from a licensee to an intervenor, if "there has been legal harm to the Intervenors caused by some activity or action of the Licensee." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-99-27, 50 NRC 45, 53 (1999); *see also Duke Power Company* (Perkins Nuclear Station, Units 1, 2, & 3), LBP-82-81, 16 NRC 1128, 1140-41 (1982).

[135] *Energy and Water Development Appropriations Act of 1993*, Pub. L. No. 102-377, Title V, § 502, 106 Stat. 1342 (1992). This law made permanent the proscription against funding to intervenors that had been attached to NRC appropriations bills for several previous years. *See, e.g.*, Pub. L. No. 97-88, Title V, § 502, 95 Stat. 1148 (1981).

used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings . . . ."[136]

Given that the Commission's calls for licensing boards to sanction parties that violate NRC rules do not have the purpose of relieving intervenors of their adjudicatory expenses, but would merely have an incidental effect, as part of an overall effort to ensure that "the [licensing] process moves along at an expeditious pace . . ."[137] that in no way singles out intervenors "as a

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[136] *Id.* § 502. According to NRC Staff, this prohibition extends to any form of monetary payment from NRC Staff to Intervenors — including monetary sanctions. As support for this position, NRC Staff cites a Comptroller General decision, which states that the terms of Section 502 "unambiguously prohibit the use of appropriated funds for payments *of any kind* to intervenors." *Availability of Funds for Payment of Intervenor Attorney Fees – Nuclear Regulatory Commission*, 62 Comp. Gen. 692, 695 (1983) (emphasis added). (In this decision, the Comptroller General was actually interpreting an earlier incarnation of Section 502, identical in language, which appeared in the Energy and Water Development Appropriation Act of 1982.)

But in an earlier decision, the Comptroller General had also explained that a Commission action does not violate Section 502 simply because it "incidentally eases the cost burden on intervenors," upholding a Commission proposal to provide free hearing transcripts to all parties to commission proceedings, even though the proposal would technically provide monetary assistance to intervenors. *Free Transcripts of Adjudicatory Proceedings – Nuclear Regulatory Commission*, B-200585, 1981 WL 23995, *3 (Comp. Gen. 1981). In this decision, the Comptroller General interpreted Section 502 as it appeared in the Energy and Water Appropriation Act of 1981. The Comptroller General explained that "the intent of [Section 502] was to preclude the Commission from implementing any program which was intended to and had the principal effect of paying the adjudicatory expenses of intervenors as a special class." *Id.* at *2. The proposal to provide transcripts, on the other hand, was designed principally "to increase the efficiency of [the Commission's] own operations and to expedite the handling of license applications." *Id.* at *3. Thus, it was not held to violate Section 502.

More recently, a Licensing Board relied on *Free Transcripts* to find that payments from the NRC to an intervenor's expert witness – payments which are required by 10 C.F.R. § 2.740a(h) – are not barred by Section 502. *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-03-14, 58 NRC 104 (2003). The Board reasoned that the fact that Section 2.740a(h) (the provisions of which are now found at 10 C.F.R. § 2.706(a)(8)), as applied to intervenors would incidentally provide a monetary benefit to intervenors, "does not require appropriated funds to be used to provide special assistance just to intervenors." *Id.* at 112. Rather, it requires assistance to all parties that obtain expert witnesses. Because "the rule treats all parties the same," the Board explained, it does not violate Section 502. *Id.*

[137] *Statement of Policy on Conduct of Licensing Proceedings*, 13 NRC at 454.

special class,"[138] it might be said that in appropriate situations licensing boards do have the authority to impose monetary sanctions on any party to any other party without violating the prohibition of Section 502.

In this instance, however, we decline to award the monetary sanctions sought by Intervenors, because they are not warranted in any event. The Commission has made clear that sanctions are appropriate only in cases of "willful, prejudicial, and bad-faith behavior,"[139] and the record fails to establish that the NRC Staff acted willfully or in bad faith by not withdrawing its motion for reconsideration sooner. Thus, no sanction — either monetary or in the form of a default order — would be appropriate. Intervenors' request for sanctions is therefore denied.

III. Intervenors' New Contention on Arsenic and Health Impacts

Intervenors on September 22, 2008, filed a new contention and a petition seeking leave to file the same.[140] Intervenors indicate that the filing of this contention was prompted by the August 20, 2008, publication in the Journal of the American Medical Association of a study by the Johns Hopkins Bloomberg School of Public Health.[141] The conclusions of this study include a "finding support[ing] the hypothesis that low levels of exposure to inorganic arsenic in drinking water, a widespread exposure worldwide, may play a role in diabetes prevalence."[142] Intervenors connect this new information with, among other things, additional newly-discovered

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[138] *Free Transcripts*, 1981 WL at *3.

[139] *Private Fuel Storage*, CLI-01-1, 53 NRC at 7.

[140] Petition for Leave to File New Contention re: Arsenic (Sept. 22, 2008) [hereinafter 9/22/08 Petition].

[141] *Id.* at 1.

[142] *Id.*, Exh. A, Ana Navas-Ancien *et al.*, *Arsenic Exposure and Prevalence of Type 2 Diabetes in US Adults*, 300 J. Am. Med. Ass'n, 814 (2008) [hereinafter Johns Hopkins Study].

information about a high incidence of pancreatic cancer in Chadron, Nebraska, and on the Pine Ridge Indian Reservation; and already existing information about a link between diabetes and pancreatic cancer, and about arsenic in the water that is returned to relevant aquifers during the course of Crow Butte's mining process.[143]

Applicant opposes admission of this new contention, arguing among other things that the contention fails to meet requirements related to timeliness and amendment of contentions found at 10 C.F.R. §§ 2.309(c)(1) and 2.309(f)(2), as well as the contention admissibility requirements of § 2.309(f)(1).[144] NRC Staff also opposes admission of this new contention, asserting that it fails to meet the same requirements cited by Applicant, and arguing as well that the Hopkins study in fact indicates that further studies are "needed to establish whether [the association between low levels of arsenic and diabetes] is causal."[145] Staff also, however, argues that "the issues raised by this new contention — potential human health effects of consuming arsenic — are subsumed within either admitted Contention A or B."[146]

We agree with Staff that the issues set forth in Intervenors' new contention fall within already-admitted Contention B, which we admitted in the following form:

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

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[143] 9/22/08 Petition at 1-8.

[144] Crow Butte Resources, Inc.'s Response to Consolidated Petitioners' Late-Filed Contention (Oct. 14, 2008) at 1-8.

[145] NRC Staff's Response in Opposition to Petition for Leave to File New Contention re: Arsenic (Oct. 14, 2008) at 17 [hereinafter Staff 10/14/08 Response] (quoting Johns Hopkins Study at 814).

[146] *Id.* at 3.

The issues in their newly-proffered contention are clearly relevant to Contention B, and Intervenors may therefore litigate these matters as part of the litigation of Contention B.[147]

IV. Participation of Black Hills/Oglala Delegation of Great Sioux Nation Treaty Council

The Black Hills Sioux Nation Treaty Council has indicated that it wishes to participate in this proceeding, with regard to all contentions.[148] In addition we have filed before us a pleading of the Oglala Delegation of the Great Sioux Nation Treaty Council,[149] which we construe as indicating a desire to participate in this proceeding. We presume that there is but one Treaty Council and that both pleadings refer to that same Council. We also note that the Licensing Board in the related license renewal proceeding has permitted the participation of the Treaty Council in that proceeding,[150] and we likewise find that this would be appropriate in this proceeding. We would ask that the Treaty Council indicate which title is more correct. We will address at the next prehearing conference in the proceeding the possibility of coordinating and

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[147] We note that the Licensing Board in the license renewal proceeding on Crow Butte's existing license admitted essentially the same contention. Order (Ruling on Motion to Admit New Contention) (Dec. 10, 2008) (unpublished). Although the issues in the contention before the license renewal board involve effects from the Applicant's current site, the same issues are generally applicable with regard to the contention before us, and we adopt that board's reasoning as supporting our finding that the matters raised in the new contention may be litigated as part of Contention B in this proceeding. While the geology of the proposed expansion site will differ from that of the original site (to an extent to be determined), the record of any contamination that may have come from the original site will obviously be relevant to the probability of contamination resulting from expansion to the new site, given that they are in the same general area.

[148] Black Hills Sioux Nation Treaty Council's Response to the Board's Order Regarding Participation and Adoption of Contentions (Aug. 15, 2008).

[149] 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) [hereinafter Treaty Council Reply].

[150] *See Crow Butte*, LBP-08-24, 68 NRC at 82; *see also* Transcript in License Renewal Proceeding at 424-29.

consolidating the presentations of the Tribe, the Treaty Council and the Petitioners with regard to the various contentions.[151]

V. Intervenors' Request for Subpart G Hearing

The Intervenors have formally requested that this Board apply "Subpart G Hearing Procedures to this proceeding, pursuant to 10 C.F.R. § 2.310(d)."[152] Both Staff and Applicant oppose this request,[153] arguing that Intervenors' reliance on § 2.310(d) is misplaced as it does not apply to license amendments issued under Part 40, but instead "applies only to 'nuclear power reactors.'"[154] We note also the provision at 10 C.F.R. § 2.310(a), to the effect that "licensee-initiated amendments . . . subject to part[ ] . . . 40 . . . *may* be conducted under the procedures of subpart L of [part 2]," suggesting that whether or not to proceed under Subpart L is a discretionary matter. In the end, however, we are persuaded that the more specific provisions of 10 C.F.R. § 2.700 control with regard to subpart G hearings. Section 2.700 provides that Subpart G applies only to certain enumerated types of proceedings, *not including* proceedings such as the instant case, *but including* "any other proceeding as ordered by the Commission."[155] We note as well that this section concludes with the language that, "[i]f there is any conflict between the provisions of this subpart and those set forth in subpart C of this part [§ 2.300 *et seq.*], the provisions of this subpart control."[156]

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[151] *See generally* 10 C.F.R. § 2.329 (regarding prehearing conferences).

[152] Reference Petition at 5.

[153] *See*, *e.g.*, Applicant 6/9/08 Response at 11-13; Staff 5/23/08 Response at 6-9.

[154] Staff 5/23/08 Response at 7.

[155] 10 C.F.R. § 2.700.

[156] *Id.*

We therefore do not grant Intervenors' request to conduct this proceeding under the provisions of Subpart G. We do, however, recommend to the Commission that it order that the proceeding be conducted as a Subpart G proceeding. We do not make this recommendation lightly, but rather see it as appropriate in light of several circumstances, including allegations made by Intervenors that would, if this were a nuclear power reactor case, warrant proceeding under Subpart G. These allegations concern failures to disclose certain information, one instance of which Applicant has admitted — namely, that it is indeed foreign-owned as alleged by Intervenors. We hasten to note that Applicant and Staff argue that no such disclosure is required in an application under Part 40,[157] and thus the significance of the failure to disclose is in dispute. At the same time, we observe that, whatever the legal requirement for such disclosure may be (and, as discussed in our ruling on Contention E, such a requirement is certainly arguable at the very least), the statements made in the Application and cited to us by Intervenors do suggest a certain lack of "completeness and accuracy."[158]

Specifically, we note the following language, cited by Intervenors in their Petition:

> ER 1.1.1 Crow Butte Uranium Project Background
>
> The original development of what is now the Crow Butte Uranium Project was performed by Wyoming Fuel Corporation, which constructed a research and development (R&D) facility in 1986. The project was subsequently acquired and operated by Ferret Exploration Company of Nebraska until May 1994, when the name was changed to Crow Butte Resources, Inc. (CBR). This change was only a name change and not an ownership change. CBR is the owner and operator of the Crow Butte Project.[159]

By referring to ownership in a section of the Application addressing Crow Butte's "Background," and not continuing, in its recitation of Crow Butte's ownership history, to include ownership by Cameco, Applicant might well be viewed as implying that there has been *no* "ownership

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[157] *See supra* n.82.

[158] *See* 10 C.F.R. § 40.9(a).

[159] Reference Petition at 25.

change." And one might reasonably be left with the impression that the Applicant did not wish that Cameco's involvement be made public, as it would be if mentioned, given that, by virtue of the NRC providing the public with notice of opportunity for hearing with respect to the Application, the Application itself would thereby be made public.[160]

As Intervenors also assert, the "nature of the issues in this case, the technical issues related to water movement, geological formations, intermixing of the aquifers, as well as the cultural and indigenous peoples issues," also warrant holding a Subpart G hearing.[161] We agree. We find that having live witnesses to question for clarification as they give oral testimony, as well as allowing for cross-examination of such witnesses, would enhance the presentations on, and lend needed clarity to, complex technical issues, as to which certain allegations of past withholding of information have been made.[162] Although these allegations relate to historical information that is in fact, in dispute,[163] it appears that disputes between Applicant and at least some of the Intervenors have been ongoing for some time, obviously continuing to this day. As noted *supra*, Intervenors also allege some motivation on Applicant's part to value the "foreign profits" of Cameco over environmental and health concerns in the U.S., based on Cameco being a Canadian corporation.[164] This is not to suggest the truth of this allegation, but merely to note it, in the context of an issue in which questions of motive may come into play.

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[160] We are aware of no considerations at this point in this proceeding that might make any parts of the Application at issue not subject to public disclosure.

[161] Tr. at 366.

[162] *See* Petitioners 5/23/08 Brief at 57-61.

[163] *See* Staff 6/9/08 Response at 9; Applicant 6/9/08 Response at 9-13; Applicant's Reply Brief Regarding Foreign Ownership and Hearing Procedures (June 16, 2008) at 6 [hereinafter Applicant 6/16/08 Reply Brief].

[164] *See supra* n.87 and accompanying text.

The circumstances discussed in the previous two paragraphs support the appropriateness of proceeding under Subpart G. While we emphasize that we do not see the proceeding as an appropriate forum to "throw[ ] open an opportunity to engage in a free-ranging inquiry in the 'character' of the licensee,"[165] or to raise any and all possible past problems with no bearing on the matter before us,[166] we find allegations regarding faulting and the nature of the geology of the area surrounding the proposed expansion site to be relevant to the matters at issue in this proceeding, and that allegations of nondisclosure of information regarding these significant geological issues merit our consideration and that of the Commission.[167]

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[165] *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 189 (1999) (citing *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993)).

[166] *See*, *e.g.*, Applicant 6/16/08 Reply Brief at 4-6 (citing, *Vogtle*, 38 NRC at 36 n.22).

[167] We recognize that Staff did respond to a letter regarding such allegations, *see* Staff 6/9/08 Response at 9, but this does not negate the relevance of the information in question. The Intervenors herein are primarily concerned with the purity of the water they use, and have indicated that what they want is to have a full and fair examination of all factors related to this. We find that such an examination is appropriate, and that consideration of all information relevant to such inquiry is also necessarily appropriate to such an examination.

We also recognize that Staff and Applicant challenge the fact that the information in question was not brought out by Intervenors in their original petitions. *See*, *e.g.*, Staff 6/9/08 Response at 9; Applicant 6/9/08 Response at 10. The information in question was, however, brought out in response to the Board's request for further briefing on the Subpart G question. In addition, although 10 C.F.R. § 2.309(g) (which Intervenors rely on in their request) requires any petitioner relying on § 2.310(d) to "demonstrate, by reference to the contention and the bases provided and the specific procedures procedures in subpart G . . . that resolution of the contention necessitates resolution of material issues of fact which may be best determined through the use of the identified procedures," we find that Intervenors have provided such demonstration through information provided in their Petition, and that the information about alleged nondisclosure of pertinent geological information merely adds to that in the Petition, and bolsters our recommendation herein. Moreover, the fact that this information was not in the Petition would not foreclose its use in a hearing, and it would seem to defy logic not to permit a licensing board or the Commission to consider all factors that could be relevant to determining which hearing procedures under Subpart 2 are the most appropriate for any given proceeding. In this proceeding, we as the Licensing Board recommend to the Commission that the proceeding be conducted under Subpart G, for the reasons we provide herein, and think it appropriate for the Commission, in making the final ruling on this, to have all available relevant information at its disposal.

By analogy to the provisions of both § 2.310(d) and § 2.700, we, as the presiding officer in this proceeding, find, regarding these circumstances and allegations of nondisclosure of information, that resolution of the contentions before us "necessitates resolution of . . . issues of motive or intent of [a] party . . . material to the resolution of . . . contested matter[s]."[168] Although the matters at issue concern mining of source material and not a nuclear power reactor, we find that these matters hold great significance for the parties in this case, such that it, like any proceeding involving reactors and comparable circumstances, should appropriately be held under the provisions of Subpart G. We would furthermore point out that, based on our experience in this proceeding and the information we have regarding it to date, opening the proceeding up to the greater transparency associated with a Subpart G hearing would be eminently appropriate. We are confident that we can manage the proceeding so as to ensure all appropriate efficiencies and prevent any inappropriate delaying or other tactics, and would make this clear to all parties unequivocally, on an as-needed and continuing basis.

The same would apply to discovery prior to the actual hearing. Allowing for discovery under Subpart G would better ensure disclosure of all pertinent information, in a situation in which one or more parties might arguably not be motivated to be completely forthcoming under the mandatory disclosure provisions of Subpart L. We make this observation not in any way to cast any aspersions on any party, but in recognition of the fact that there have already been intimations of failure to disclose completely relevant information, and of the circumstance that the Applicant and the Intervenors already, prior to this proceeding, had an adversarial

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[168] There is one exception to this statement. We do not expect that resolution of Contention C will involve issues relating to nondisclosure of information, given that the Staff has yet to perform its function regarding consultation with the Tribe regarding historic and prehistoric cultural resources, and we expect that it will perform its duty in this regard in good faith. This has not yet, however, to our knowledge occurred. Moreover, we deem that to hold most of the proceeding under Subpart G and one part under Subpart L would add potential confusion and inefficiency to the overall proceeding. We therefore recommend that the entire proceeding be conducted under Subpart G.

relationship. In such circumstances, it is our judgment that more complete sharing of relevant information on all matters in dispute will be forthcoming under the provisions of Subpart G, with the guiding hand of the Licensing Board to manage any disputes, in comparison to the mandatory disclosure provisions of Subpart L. Under Subpart L, notwithstanding their designation as "mandatory" disclosures, any actual failures to disclose will be much less apparent — indeed, virtually impossible to ascertain, as they depend on the parties to provide all information more or less "on their honor," without any provision for parties to request specific information and specific responses. Subpart G, on the other hand, offers a manageable way in which to control the sharing of information through discovery, in which parties may bring any disputes to the Board expeditiously for resolution. Through appropriate case management, all appropriate efficiencies may thus be assured, allowing for needed sharing of information while at the same time drawing the line when this becomes overly burdensome.

We observe, finally, that a significant number of persons associated with this proceeding are Native Americans, with the Oglala Sioux Tribe and the Tribe's Treaty Council expressing, as participants, affirmative and strong interest in the proceedings.[169] We note also the interest shown by the attendance of many community members and members of the Pine Ridge Reservation, including high school students, at the oral arguments in this proceeding.

In light of all the preceding considerations, we find that it would be appropriate to conduct this proceeding in the most open and transparent way possible, in a manner that will permit attendance by all who have any interest and best allow for a decision — whatever it may be (and we suggest no outcome one way or the other in anything we state herein) — that will instill trust in all parties, including the Applicant, the NRC Staff, the Intervenors, the Tribe, the

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[169] *See*, *e.g.*, Tr. at 580-84 (statements of Chief Oliver Red Cloud, Alex White Plume, and President John Steele of the Oglala Sioux Tribe). *See also U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

Tribal council, members of the local community surrounding the proposed expansion site, as well as any other interested persons. Again, we are confident that we can manage the proceeding in a manner that will best assure this result.

For all these reasons, we recommend that the Commission, as provided at 10 C.F.R. § 2.700, order that this proceeding be conducted under the provisions of 10 C.F.R. Subpart G.

VI. Unopposed Motion to Make Filings by Email

Intervenors request that they be permitted to file documents in this proceeding as PDF documents, served by email, without the need for conforming paper copies, and that the filing time for all filings be midnight Eastern time on the due date.[170] No party opposes this request, which is based on certain computer system and software incompatibilities.[171] Intervenors point out that in the *Crow Butte* license renewal proceeding, which is being conducted using the NRC's Electronic Information Exchange (EIE) e-filing system, they have been permited to file by email.[172]

We grant Intervenors' request. Subject to any problems or necessary procedures identified by the Office of the Secretary of the Commission, beginning after issuance of this Memorandum and Order this proceeding will be conducted using NRC's EIE system, except that Intervenors will be permitted to make filings by email, as in the license renewal proceeding.

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[170] Unopposed Motion to Make Filings by Email (Dec. 3, 2008) at 1 [hereinafter Email Filings Motion].

[171] *Id.* at 2.

[172] *Id.*

VII. Conclusion and Order

Based upon the preceding findings and rulings, we make the following conclusions, this 15th day of January, 2009:

A. We conclude that Intervenors' Contention E meets all the requirements of 10 C.F.R. § 2.309(f)(1); having already found that Intervenors have established standing to participate in this proceeding, conclude that no separate showing of standing is required with regard to the contention; and therefore ADMIT Contention E.

B. We DENY Intervenors' motion for sanctions.

C. We conclude that Intervenors' new allegations and issues submitted with respect to arsenic and health effects, as discussed in § III *supra*, may be litigated under already-admitted Contention B in this proceeding.

D. We conclude that the Black Hills/Oglala Delegation of the Great Sioux Nation Treaty Council may participate in this proceeding under 10 C.F.R. § 2.315(c), and request that the Treaty Council advise the Licensing Board and all parties of its correct title, single designated representative as provided at § 2.309(d)(2)(i), and counsel, within ten (10) days of issuance of this Memorandum and Order. The Board will hold another prehearing conference at a date and in a manner to be determined (*i.e.*, in person or by telephone conference), at which matters to be considered will including the possibility of coordinating and consolidating the presentations of the Tribe, the Treaty council and the Petitioners with regard to the various contentions.

E. We conclude that this proceeding would appropriately be conducted according to the provisions of 10 C.F.R. Subpart G, and, pursuant to 10 C.F.R. § 2.700, recommend to the Commission that it order this to occur.

F. We grant Intervenors' request to permit all filings in this proceeding to be made electronically, pursuant to the NRC's EIE system, with Intervenors being permitted to file by

email, subject to any problems or necessary procedures identified by the Office of the Secretary of the Commission.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

_____***/RA/***_____
Ann Marshall Young, Chair
ADMINISTRATIVE JUDGE

_____***/RA/***_____
Dr. Richard F. Cole
ADMINISTRATIVE JUDGE

_____***/RA/***_____
Dr. Fred W. Oliver
ADMINISTRATIVE JUDGE

Rockville, Maryland
January 27, 2009[173]

[173] Copies of this Memorandum and Order were sent this date by Internet email transmission to all participants or counsel for participants.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of		
	)	
CROW BUTTE RESOURCES, INC.	)	Docket No. 40-8943-MLA
	)	
In-situ Leach Uranium Recovery Facility,	)	
Crawford, Nebraska	)	
	)	
(License Amendment for the North Trend	)	
Expansion Area)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MEMORANDUM AND ORDER (RULING ON FOREIGN OWNERSHIP AND ARSENIC CONTENTIONS AND OTHER PENDING MATTERS) have been served upon the following persons by U.S. Mail, first class, or through NRC internal distribution.

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Docket No. 40-8943-MLA
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Docket No. 40-8943-MLA
LB MEMORANDUM AND ORDER (RULING ON FOREIGN OWNERSHIP AND ARSENIC CONTENTIONS AND OTHER PENDING MATTERS)

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of January 2009