

February 6, 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CROW BUTTE RESOURCES' NOTICE OF APPEAL OF LBP-09-01

Pursuant to 10 C.F.R. §§ 2.311(a), (c), and (d), Crow Butte Resources, Inc. files this Notice of Appeal of the Atomic Safety and Licensing Board's Memorandum and Order, dated January 27, 2009, which, among other things, admitted for litigation in the above captioned proceeding one contention related to Crow Butte's license amendment application for the North Trend Expansion Area and recommended that the Commission order the proceeding to be conducted under 10 C.F.R. Part 2, Subpart G. Attached is a Brief in support of this appeal.

Respectfully submitted,

/s/ signed electronically by \_\_\_\_\_  
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RESOURCES, INC.

Dated at San Francisco, California  
this 6<sup>th</sup> day of February 2009

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BRIEF IN SUPPORT OF CROW BUTTE RESOURCES' APPEAL FROM LBP-09-01

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311(a), (c), and (d), Crow Butte Resources, Inc. (“Crow Butte” or “Applicant”) hereby appeals the Atomic Safety and Licensing Board (“Board”) decision on standing, contentions, and hearing procedures (LBP-09-01), dated January 27, 2009. That decision concerns an application by Crow Butte for an amendment to its existing license that would permit expansion of the situ uranium recovery (“ISR”) operation in Crawford, Nebraska. In LBP-09-01, the Board concluded that the Petitioners do not need to establish standing for each contention, admitted one outstanding contention that had been submitted with the original petition (Contention E), permitted litigation of a new, late-filed contention in conjunction with a previously-admitted contention (Contention B), and recommended that the Commission order the proceeding to be conducted under Subpart G procedures. For the reasons discussed below, we respectfully request that the Commission reverse the Board’s decisions. The request for hearing and petition to intervene should be wholly denied.<sup>1</sup> To the extent any

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<sup>1</sup> In LBP-08-06, dated April 29, 2008, the Licensing Board found that Consolidated Petitioners had standing and admitted three contentions (Contentions A, B, and C). Crow

hearing is held, we request that the Commission decline to adopt the Board's recommendation and direct the use of the procedures in 10 C.F.R. Part 2, Subpart L, in accordance with the Commission's regulations.

## II. FACTUAL BACKGROUND

Crow Butte is currently licensed to operate an in-situ uranium recovery facility in Crawford, Nebraska. On May 30, 2007, Crow Butte requested an amendment to its license that would allow the development of a satellite facility, the "North Trend Expansion Area," near its existing ISR operation.<sup>2</sup> The amendment request included a Technical Report ("TR") and an Environmental Report ("ER"). A notice of an opportunity for hearing was posted on the NRC website on September 13, 2007, with a deadline for filing requests for hearing of November 12, 2007.

On November 12, 2007, NRC received by e-mail timely petitions from the following individuals and organizations: (1) Debra White Plume, (2) Thomas Cook, (3) Owe Aku/Bring Back the Way, (4) Chadron Native American Center, (5) High Plains Development Corporation, (6) Slim Buttes Agricultural Development Corporation, and (7) Western Nebraska Resources Council (collectively "Petitioners"). The Petitioners proposed six contentions

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Butte and the NRC Staff have both appealed the Board's decision, arguing that the Consolidated Petitioners' request for hearing should have been wholly denied. *See* "Crow Butte Resources' Notice of Appeal From LBP-08-06," dated May 9, 2008, and "NRC Staff's Notice of Appeal of LBP-08-06, Licensing Board's Order of April 29, 2008, and Accompanying Brief," dated May 9, 2008. Reversal of LBP-08-06, in conjunction with a reversal of LBP-09-01, would result in the Petition being wholly denied. For this reason, the appeal of LBP-08-06 is appropriate under 10 C.F.R. § 2.311(a) and (c).

<sup>2</sup> Ltr. from Stephen P. Collings to Charles L. Miller, dated May 30, 2007 (ADAMS Accession No. ML0715500570).

(Contentions A through F). Crow Butte and the NRC Staff filed responses on December 6 and 7, 2007, respectively.

On December 28, 2007, Petitioners filed supplemental standing affidavits and a consolidated version of the original petitions — the “Reference Petition” (hereinafter “Petition”). Both Crow Butte and the NRC Staff filed objections to the supplemental affidavits on January 4, 2008. Owe Aku requested two additional weeks to provide additional affidavits, and the Board granted an extension until January 11, 2008. The Board heard oral argument on Petitioners’ standing and contentions on January 16, 2008. During argument, counsel for Petitioners proffered two new documents, referred to as Exhibits A and B, in support of petitioners’ standing and as additional bases for Contentions A and B.

The Board, in an Order dated January 24, 2008, set deadlines for Crow Butte and the NRC Staff to file responses to the newly-filed exhibits, as well as for a series of additional briefs on issues raised *sua sponte* by the Board. First, on January 30, 2008, Crow Butte provided the Board with citations to international agreements on non-proliferation and the NRC Staff filed citations regarding the need for an opportunity for a hearing on materials license transfers and amendments. Then, Crow Butte and NRC Staff filed their responses to the new exhibits on February 8, and Petitioners jointly filed a combined reply to these on February 15. Next, on February 21 and 22, the parties filed briefs addressing the import of the Fort Laramie Treaties of 1851 and 1868, and the United Nations Declaration of Right of Indigenous Peoples, “insofar as [they] may be relevant to standing and any contentions concerning water rights and consultation with Native Americans on historical sites and artifacts.” Responses were filed on February 29. In addition, on February 22, the Board received two briefs *amicus curiae*, with motions for leave to file the same — one from the Oglala Sioux Tribe and one from the Center for Water

Advocacy (CWA), Rock the Earth, and Mr. Robert Lippman. Crow Butte and the NRC Staff filed responses opposing these motions on March 3; movants CWA *et al.* filed a reply on March 10; and Crow Butte filed a letter opposing the reply on March 13, 2008.

The Board issued a partial decision on standing and contentions (LBP-08-06) on April 29, 2008. The Board reframed and admitted Contentions A, B, and C, and rejected Contentions D and F. Both the NRC Staff and Crow Butte appealed LBP-08-06 on May 9, 2008. *See supra*, note 1. As for Contention E,<sup>3</sup> the Board directed supplemental briefing and held additional oral argument.<sup>4</sup> The Board also reserved judgment on whether the proceeding should be held under the procedures in 10 C.F.R Part 2, Subpart L (the default procedures for this type of proceeding) or under Subpart G's formal adjudicatory procedures.

Consistent with the Board's direction in LBP-08-06, the parties filed several supplemental briefs regarding Contention E and hearing procedures. *See, e.g.*, "Applicant's Brief Regarding Foreign Ownership Issues," dated May 23, 2008; "Applicant's Consolidated Response Regarding Foreign Ownership And Hearing Procedures," dated June 9, 2008; and "Applicant's Reply Brief Regarding Foreign Ownership And Hearing Procedures," dated June 16, 2008. A second oral argument was held in Chadron, Nebraska on July 23, 2008, which was followed by a site visit to Crow Butte on July 24, 2008.

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<sup>3</sup> Contention E states: "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." Pet., at 24.

<sup>4</sup> Crow Butte and the NRC Staff have both argued that the ownership issue is outside the scope of the license amendment proceeding based on the fact that there is no change in ownership associated with the amendment application. In ordering further briefing, the Licensing Board disagreed. LBP-08-06, slip op. at 119; *see also* LBP-09-01, slip. op. at 28 and n.93.

Following the second prehearing conference and site visit, the Board directed the parties to submit additional briefs on several topics. *See, e.g.*, “Applicant’s Response To Board Order Regarding Standing,” dated August 15, 2008; “Applicant’s Response To Petitioners’ Post-Argument Submission Re: NDEQ Consent Decree,” dated August 22, 2008; “Applicant’s Reply To Petitioners’ Filing Re Standing,” dated August 29, 2008; “Applicant’s Response To NRC Staff’s Response To Board’s Order Of August 5, 2008,” dated August 29, 2008; and “Applicant’s Reply To Petitioners’ Brief On Export Licensing,” dated September 8, 2008.

On September 22, 2008, the Petitioners filed an additional contention. *See* “Petition for Leave to File New Contention Re: Arsenic.” Both Crow Butte and the NRC opposed admission of the late-filed contention. *See, e.g.*, “Crow Butte Resources, Inc.’s Response To Consolidated Petitioners’ Late-Filed Contention,” dated October 14, 2008. And, on October 2, 2008, the Board presiding in this proceeding joined the parties and Licensing Board in the separate, pending proceeding for renewal of Crow Butte’s source material license for a tour of the Pine Ridge Indian Reservation.

### III. STANDARD OF REVIEW

#### A. Standing

Any person who requests a hearing or seeks to intervene in a Commission proceeding must demonstrate that he or she has standing. 10 C.F.R. § 2.309(a). The Commission has long applied contemporaneous judicial concepts of standing to determine whether a party has a sufficient interest to intervene as a matter of right. *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 195 (1998). To establish standing, there must be an “injury-in-fact” that is either actual or threatened. *Id.*, citing *Wilderness Soc’y v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987). The injury must be “concrete and particularized,” not “conjectural” or

“hypothetical.” *Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

Further, a petitioner must establish a causal nexus between the alleged injury and the challenged action. *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 & 2), LBP-98-27, 48 NRC 271, 276 (1998), *aff’d*, CLI-99-4, 49 NRC 185 (1999). A determination that the injury is fairly traceable to the challenged action depends, in part, on whether the chain of causation is “plausible.” *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75. Judicial and Commission standing jurisprudence requires “realistic threat ... of direct injury.” *Int’l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 254 (2001).

Finally, a petitioner must establish redressibility — that is, that the claimed actual or threatened injury could be cured by some action of the decisionmaker. *Sequoyah Fuels Corp.* (Gore, Oklahoma Site Decommissioning), CLI-01-2, 53 NRC 9, 14 (2001).

The Commission has specifically addressed standing in a materials license *amendment* proceeding and held that a petitioner must show that the amendment will cause a “distinct new harm or threat’ apart from the activities already licensed.” *White Mesa*, CLI-01-21, 54 NRC at 251. Moreover, the petitioner must show a “plausible chain of causation” for the new and distinct harm; conclusory allegations about potential radiological harm from the facility in general, which are not tied to the specific amendment at issue, are insufficient to establish standing. *White Mesa*, CLI-01-21, 54 NRC at 251.

#### B. Admissibility Of Contentions

To gain admission to a proceeding as a party, a petitioner must submit at least one valid contention that meets the requirements of 10 C.F.R. § 2.309(f)(1). The contention rule is “strict by design,” *Dominion Nuclear Conn., Inc.*, (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), and failure to comply with any of the admissibility

requirements is grounds for dismissal of a contention. *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). The Commission's procedures do not allow "the filing of a vague, unparticularized contention,' unsupported by affidavit, expert, or documentary support." *N. Atl. Energy Serv. Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999), quoting *Balt. Gas & Elec. Co.* (Calvert Cliffs Nuclear Power Plant), CLI-98-25, 48 NRC 325, 349 (1998). Likewise, Commission practice does not "permit 'notice pleading,' with details to be filled in later." *Id.*

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



The significance of this principle is apparent in the instant case. Contentions A and B address the potential for contamination of groundwater and surface water. Standing to bring Contentions A and B is based on the alleged injuries to Petitioners resulting from Crow Butte's operations due to speculative groundwater and surface water contamination. If sufficiently supported (they were not), these asserted bases for standing would at least establish a nexus between the claim asserted and the alleged injury-in-fact. No such nexus exists for Contention E.

Contention E alleges (without support or basis) that, because Crow Butte is ultimately owned by Cameco, uranium from Crow Butte may be sold to other non-U.S. buyers such as China, India, Pakistan, North Korea and possibly Iran. The issue is wholly unrelated to groundwater or surface water contamination. Petitioners have not attempted to show how they might suffer particularized injury from such sales, much less shown how a decision to deny the license amendment application would remedy any harm to them. Indeed, denial of the license amendment would not cause Crow Butte's current operations to cease.<sup>6</sup> In this regard, there is no nexus between the alleged injury (groundwater and surface water contamination) and the contention (foreign ownership and sales of uranium). Consequently, Petitioners lack standing for Contention E.

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<sup>6</sup> This conclusion supports and amplifies the other arguments made by Crow Butte and the NRC Staff with respect to Contention E. Specifically, Crow Butte and the NRC Staff have argued that Contention E raises issues outside the scope of the license amendment proceeding because the amendment request does not involve a change in ownership. Because Crow Butte has not requested a change in ownership, a favorable decision on Contention E would not redress any alleged injury caused by ongoing operations under the current ownership. The injury must be due to the amendment and not to the license itself, which was granted previously. See *Energy Fuels Nuclear, Inc.* (White Mesa Uranium Mill), LBP-97-10, 45 NRC 429, 431 (1997). The acquisition of Crow Butte by Cameco was a past licensing issue addressed by the NRC Staff. At this point, any issue with respect to past ownership changes would be an enforcement issue, not a present licensing issue.

The Commission has repeatedly and unambiguously stated that contemporaneous judicial concepts of standing should be applied by adjudicatory boards in determining whether a petitioner is entitled to intervene as of right under Section 189a of the Atomic Energy Act.<sup>7</sup> As discussed below, the U.S. Supreme Court has made clear that parties must demonstrate standing for every claim and for every form of relief requested.

The Supreme Court recently reaffirmed the principle that standing must be shown for every single claim in *Davis v. Federal Election Commission*. Precisely relevant to the current situation, the *Davis* Court reiterated that “standing is not dispensed in gross,” and remarked that a party “must demonstrate standing for each claim he seeks to press” and “for each form of relief that is sought.” \_\_\_ U.S. \_\_\_, slip op. at 7 (June 26, 2008) citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) and *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000); see also, *Rosen v. Tenn. Commissioner of Finance and Admin.*, 288 F.3d 918 (6th Cir. 2002) (“It is black-letter law that standing is a claim-by-claim issue.”). According to the Court, standing for one claim does not suffice for all claims even where those claims arise from the same nucleus of operative fact. *DaimlerChrysler*, 547 U.S. at 352. Because standing is rooted in the need for an actual “case or controversy,” holding otherwise, the Court noted, would undermine other important judicial principles and permit, for example, adjudication of moot or unripe claims. *Id.*

The Board concluded that *Yankee* does not support a requirement that there be a nexus between the alleged injury that is the basis for standing and the proposed contention.

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<sup>7</sup> See, e.g., *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Atlas Corporation* (Moab, Utah), LBP-00-4, 51 NRC 53, 55 (2000); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), LBP-02-4, 55 NRC 49, 62 (2002).

LBP-09-01 at 6. In addressing Crow Butte’s argument that remedying the alleged injuries in this proceeding, which related only to speculative groundwater contamination, would not be redressed by a favorable decision with respect to Contention E, the Board determined that standing had been shown for each form of “relief” because Contention E (and, indeed, any contention), if proven, could result in denial of the license amendment. *Id.*, at 8. According to the Board’s logic, because the proposed contentions *could* result in the same form of relief (*i.e.*, denial of license amendment), a party that has standing to raise one contention has standing to raise any contention that requests the same form of relief. This overstates the scope of the proposed contentions, ignores critical portions of the standing inquiry, and swallows the rule in *Yankee*. By focusing solely on the broadest possible relief that could be granted (*i.e.*, the redressibility prong of the standing inquiry), the Board is, in effect, reading the “injury-in-fact” and “causation” prongs out of the standing inquiry.

For example, if Petitioners were to prevail on Contentions A and B, the result would be either a conditioning of the license or denial of the amendment request. In either situation, the result would be same — the risk of contamination from North Trend would be reduced or eliminated (*i.e.*, the alleged injury would be cured). With respect to Contention E, however, if the Petitioners prevail, the outcome might only be changes in the project ownership structure or additional disclosures (*e.g.*, of its ownership, of the chain of custody of nuclear materials, of project benefits, etc.). The risk of contamination would not change and the alleged injuries would not be cured.<sup>8</sup>

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<sup>8</sup> There is a close connection between an alleged contention and the relief that can be afforded following a favorable ruling on that contention. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (“The remedy must of course be limited to the inadequacy that produced the injury in fact that the [party] has established.”). While the relief for a groundwater-contamination-based contention might include conditions imposing additional

The Board also reviewed several cases cited by Crow Butte for the proposition that a party must demonstrate standing for *each and every claim*. The Board concluded that “[i]ntervenors 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.” LBP-09-01 at 15. However, “claims” are directly analogous to “contentions.” As the Board noted in discussing *Davis* and *Rosen*, those cases involved multiple “claims” challenging separate regulatory or statutory provisions and concerning requests for separate forms of relief. *Id.*, at 11. Similarly, Petitioners’ “contentions” here challenge separate regulatory provisions — for example, 10 C.F.R. § 40.32(c) requires that the applicant’s proposed equipment, facilities, procedures be adequate to protect health, while Section 40.32(d) ensures that the application is not inimical to common defense and security.<sup>9</sup> Still other contentions challenge compliance with the National Historic Preservation Act (“NHPA”) (*e.g.*, Contention C), with the National Environmental Policy Act (“NEPA”) and the NRC regulations in 10 C.F.R. Part 51, or with various sections of the Atomic Energy Act (“AEA”). And, the contentions involve different forms of relief (*e.g.*, consultation with the Oglala Sioux Tribe, limitations on ownership, or

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groundwater monitoring or capping the number of production wells, it would not be appropriate to require, for example, additional air quality monitoring. Similarly, for a contention based on foreign ownership, it would not be appropriate to limit the flow rate, impose additional monitoring, or limit the number of wells. By focusing only on the broadest *potential* form of relief from a licensing perspective (*i.e.*, denial) and not on remedying any inadequacies identified with respect to disputed aspects of the application (*e.g.*, conditioning the license or additional disclosures), the Board reads the Commission’s language in *Yankee* too broadly.

<sup>9</sup> Moreover, with respect to foreign ownership, the Board requested briefing on whether Section 103d of the AEA, which only applies to production and utilization facilities, or 10 C.F.R. § 40.38, which only applies to USEC, preclude issuance of a license to Crow Butte. *See, e.g.*, “Applicant’s Brief Regarding Foreign Ownership Issues,” dated May 23, 2008, at 3.

conditions on the license). Thus, the Federal Court precedent is fully consistent with Commission precedent in *Yankee* and with Crow Butte’s position that Petitioners lack standing to raise certain claims (Contentions C and E) in this proceeding.

Finally, demonstrating standing for each contention/claim should not result in delays or inefficiencies in NRC adjudicatory proceedings. Boards are well-equipped to assess whether an asserted injury would be remedied by a favorable ruling on a contention — this is no different than the inquiry already undertaken in every proceeding. Moreover, the requirement for standing is specifically intended to ensure that adjudicatory bodies only litigate claims that involve an actual case or controversy and where the result of the litigation will resolve that controversy. Limiting NRC adjudicatory proceedings to disputes that could cure the alleged injury ensures that NRC Staff, applicant, intervenor, Board, and Commission resources are used to resolve “live” issues and not to delve into policy issues or issues unrelated to the requested licensing action.

2. *Contention E Does Not Satisfy Criteria For An Admissible Contention*

As proposed by petitioners, Contention E states:

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.

Petition at 24. In support of this contention, petitioners identify two bases:

- “CBR is owned by Cameco since 2000. Cameco also runs operations in Canada and Kazakhstan and which sell Uranium products to other non-US buyers which may include China, India, Pakistan, North Korea and possibly Iran unless there are Canadian regulations which restrict such sales”; and
- “It is material that CBR is owned by a Canadian company that will make profit or lose on its investments. Petitioner submits that we, as US persons, care less about the profits of a Canadian company than for the health and safety of our environment. The Application makes no

reference to 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 used.”

This proposed Contention E raises issues that are clearly outside the scope of a narrow license amendment proceeding. A proposed contention must relate to the license amendment which is requested. Petitioners may not challenge activities already permitted under the license. *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), LBP-81-45, 14 NRC 853, 860 (1981). A Licensing Board only has jurisdiction over those matters which are within the scope of the amendment application. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-88-19, 28 NRC 145, 152-53 (1988). Accordingly, any assessment of a proposed contention must focus on whether the proposed contention alleges an issue raised by the amendment application. If not, then the proposed contention is outside the scope of the proceeding.

Here, there is no change in ownership associated with the amendment application. The change in ownership associated with Cameco’s acquisition of Crow Butte was previously accepted by the NRC.<sup>10</sup> The current proposed amendment would simply permit mining in a new area; the ownership of the project would not change. Any challenge related to the ownership of Crow Butte is therefore an impermissible challenge to an activity already permitted under the

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<sup>10</sup> Ltr. from Joseph Holonich, Chief, Uranium Recovery Branch, to Stephen Collings, Crow Butte Resources, dated June 5, 1998 (ADAMS Accession No. 9806120319). The NRC determined at that time that no license amendment was required. The acquisition of Crow Butte by Cameco was a past licensing issue addressed by the NRC Staff. At this point, any issue with respect to past ownership changes would be an enforcement issue, not a present licensing issue. As a result, the issue cannot now be “bootstrapped” into this limited license amendment proceeding.

existing license.<sup>11</sup> Thus, the proposed contention is outside the scope of the license amendment proceeding.

Contention E is also inadmissible because Petitioners have articulated no genuine dispute with the applicant that is supported by a factual or evidentiary basis. Although the Board decided that Contention E contains a specific statement of the law or fact to be controverted and a brief explanation of the basis — that is, it questions Cameco’s ownership of Crow Butte (*see* LBP-09-01 at 18-19) — the regulatory docket for Crow Butte in fact contains numerous correspondence regarding Cameco’s purchase of Crow Butte.<sup>12</sup> And, in explaining the basis for the contention, Petitioners do not cite any regulatory or statutory provisions that proscribe ownership of Crow Butte. There is simply no genuine dispute with the application articulated in the Petition.

Nor do Petitioners allege any specific statutory or regulatory provisions that require Crow Butte to describe its sales of uranium or its distribution of profits in detail.<sup>13</sup> Instead, Petitioners speculate and hypothesize about various scenarios without regard for the statutory, regulatory, and treaty-related obligations that apply to source material produced at Crow Butte. For example, Petitioners state that “Canadian owners may divert the Uranium

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<sup>11</sup> The Board does not appear to address this argument directly. Instead, it takes issue with the NRC Staff’s treatment of the North Trend Expansion as a satellite facility. LBP-09-01 at 28. However, satellite facilities have historically been approved as license amendments as the bulk of licensed activities will continue to take place at the main processing facility.

<sup>12</sup> *See, e.g.*, Ltr. from S. Collings, Crow Butte Resources, to Joseph Holonich, Chief, Uranium Recovery Branch, dated May 13, 1998 (ADAMS Accession No. 9805260014); Ltr. from S. Collings, Crow Butte Resources, to Thomas Essig, Chief, Uranium Recovery Branch, dated April 7, 2000 (ADAMS Accession No. ML003704916).

<sup>13</sup> Nor is there any requirement that an applicant demonstrate any particular benefit from a license amendment. *Tennessee Valley Authority* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 35 (2002).

products to non-US customers such as China, India, Pakistan, North Korea or possibly Iran” and that Cameco may sell to “non-US buyers which may include China, India, Pakistan, North Korea and possibly Iran unless there are Canadian regulations which restrict such sales.” Pet. at 25.<sup>14</sup> However, the export of source material produced at Crow Butte would not be authorized by the license amendment. Except in limited circumstances not applicable here, distribution of source material requires an export license. See 42 U.S.C. § 2094; 10 C.F.R. § 40.51; 10 C.F.R. Part 110. To the extent that petitioners proposed contention is based on the export of uranium mined at Crow Butte, or subsequent diversion of the material, it raises issues that are unrelated to the license amendment, which would only authorize possession and use (not the export) of source material.<sup>15</sup>

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<sup>14</sup> The Board also repeatedly raised hypothetical questions regarding ownership of a source material licensee by a foreign country that poses some security risk to the United States. See, e.g., LBP-09-01 at 27, n.91. To the extent this involves a generic question as to the adequacy of the NRC’s regulations, it cannot be raised in this proceeding. And, to the extent that the Board’s concern is that some other foreign company could purchase Crow Butte, the issue does not challenge the adequacy of the specific license amendment application at issue, which does not contemplate a change in ownership of Crow Butte. More directly, the non-proliferation credentials of Canada cannot be seriously questioned, nor can its important foreign policy relationship with the United States. Among other things, Canada supports the International Atomic Energy Agency (“IAEA”) safeguards, is a member of the Nuclear Suppliers Group, and is a signatory to numerous international treaties and conventions relative to non-proliferation and nuclear safety, including the Treaty on Non-Proliferation of Nuclear Weapons, the Convention on Early Notification of a Nuclear Accident, and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency. Moreover, Canada entered into an Agreement for Cooperation on Civil Uses of Atomic Energy with the United States in 1955.

<sup>15</sup> Moreover, in this license amendment proceeding, the common defense and security considerations under 10 C.F.R. § 40.32(d) are not pertinent. The Commission has recognized in previous Part 40 license amendment proceedings that, where the amendment does not involve the import or export of nuclear materials, the common defense and security considerations of 10 C.F.R. § 40.32(d) are not implicated. See *Kerr-McGee Corporation* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982). This is consistent with a judicial decision involving export licensing that evaluated the phrase “inimical to the common defense and security.” There, the court stated that, in the absence of unusual circumstances, the Commission need not look

To the extent that the contention can be read to raise proliferation issues, Contention E is similar to a contention that was rejected in the *USEC* licensing proceeding. There, the Commission affirmed an Order rejecting a proposed contention that argued that the proposed facility would not advance “national security goals” and that “constructing the ACP would encourage other countries to pursue nuclear weapons.” *USEC, Inc. (American Centrifuge Plant)*, CLI-06-10, 63 NRC 451, 469 (2006). The Commission held that the proposed contention’s generalized concerns about national security and nonproliferation did not amount to an admissible contention. *Id.*, at 470. The Commission agreed with the Board that the petitioner offered no facts or expert opinion to support its claim that the proposed facility would be inimical to common defense and security.<sup>16</sup> *Id.* Here, petitioners raise similarly broad and generalized concerns about the license amendment. Their contention is nothing more than a policy preference that does not raise a litigable issue.

For all of these reasons, Contention E is inadmissible.

B. The Late-Filed Contention Should Be Rejected

In LBP-09-01, the Board did not apply the criteria for new or amended contentions in 10 C.F.R. § 2.309(f)(2) or address the late-filed factors in 10 C.F.R. § 2.309(c) with respect to the late-filed contention. Instead, the Board simply found that “issues set forth in the Intervenor’s new contention fall within already-admitted Contention B”; that “[t]he issues in

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beyond non-proliferation safeguards in determining whether the common defense and security standard is met. *See NRDC v. NRC*, 647 F.2d 1345, 1363 (D.C. Cir. 1981).

<sup>16</sup> In *USEC*, the Commission also noted that the proposed contentions made a “bare reference” to a NRC regulation “without explaining its significance or establishing any connection to the proffered contention.” That is more than Petitioners did here. The proposed Contention E made no reference to any NRC regulatory or statutory provisions in support of its contention.

the newly-proffered contention are clearly relevant to Contention B”; and that “Intervenors may therefore litigate these matters as part of the litigation of Contention B.” LBP-09-01 at 42-43.<sup>17</sup>

In the Late-Filed Petition, the only allegedly “new” expert information is an August 20, 2008 study by the Johns Hopkins Bloomberg School of Public Health published in the Journal of the American Medical Association. According to Petitioners, the study suggests a possible link between inorganic arsenic and type-2 diabetes. Late-Filed Pet. at 1-2. Although the Johns Hopkins study on which Consolidated Petitioners rely was not published until August 2008, the issue — the alleged link between arsenic contamination and Crow Butte’s operations — that underlies the contention was raised earlier. *See* Late-Filed Pet. at 2-3 (noting that the original petition alleged both arsenic exposure and diabetes). However, the other “new” aspect of the contention alleging a connection between Crow Butte’s operations and local incidents of cancers was not raised earlier (though it could have been) and, in any event, is unsupported speculation that does not contest any portion of the application. As a result, the issues raised in the late-filed contention should not be litigated in this proceeding.

Applying the factors in 10 C.F.R. § 2.309(f)(2), the information in the petition is not materially different from that available previously. Chronic arsenic exposure has long been known to cause adverse health effects, including cancer and diabetes; there is no “new” reason to be concerned with potential exposure to arsenic.<sup>18</sup> The study cited by Petitioners does not

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<sup>17</sup> As noted above (*supra*, note 1), Crow Butte and the NRC Staff have previously appealed the admissibility of Contention B. Contention B asserts that the North Trend Expansion will lead to contamination of the surrounding aquifers, but the contention lacks specificity and is not adequately supported.

<sup>18</sup> As the Commission has noted, NRC adjudicatory proceedings would prove endless if parties were free at hearing to introduce new claims (or putative evidence of claims) which they either originally opted not to make or which simply did not occur to them at the outset. *Hydro Resources, Inc.* (Rio Rancho, NM), CLI-04-33, 60 NRC 581, 591 (2004).

constitute a new revelation that warrants admission of the late-filed contention or litigation of new bases. Here, the Hopkins study is, at best, new evidence of the dangers of arsenic exposure. But, it does not raise for the first time the issue of the potential dangers of arsenic, nor does it raise a new issue regarding the safety controls at Crow Butte's operations. The Commission should not permit a petitioner to "bootstrap" an otherwise untimely contention into a proceeding by finding a single piece of new information. Otherwise, Petitioners could circumvent the Commission's strict contention admissibility rules by using any new information — even if only "new" in the strictest sense and not materially different from information previously available — as a basis for a late-filed contention. At bottom, there is no "good cause" or a "new basis" for late-filing where, as here, the salient facts regarding the dangers of arsenic and information regarding the controls and safety of Crow Butte's operations were available to Petitioners long ago.

Admitting this late-filed contention would also unnecessarily expand this proceeding to encompass the medical consequences of low-level arsenic exposure and the statistical significance of the incidence of diabetes and cancer in western Nebraska. *See* 10 C.F.R. § 2.309(c)(1)(vii). The issue raised by the amendment application is Crow Butte's compliance with NRC regulations related to the protection of groundwater. Neither epidemiological statistics nor the carcinogenic properties of arsenic have any direct relationship to the issue or to Crow Butte's operations, particularly in the absence of any evidence of offsite groundwater contamination. The Board and parties are not equipped to determine whether there is a medical link between arsenic exposure and pancreatic cancer (especially in the absence of any demonstrated link in scientific literature). Suffice it to say, arsenic exposure can have adverse consequences, including other forms of cancer. But, resolution of the specific question

of arsenic's contribution to the risk for pancreatic cancer would broaden the proceeding unnecessarily.

Admitting this contention also unnecessarily expands the scope of the proceeding to encompass issues relating to the current mining units. As the Board recognized, this new contention focuses on allegations of contamination from the existing facility. *See* LBP-09-01 at 43, n.147. However, that issue is the subject of the separate, pending proceeding related to the renewal of Crow Butte's source material license. The practical effect of the Board's ruling is to permit litigation of the *same issue in both proceedings*. This unnecessarily complicates the proceedings and increases the burden on all parties. To the extent that Petitioners are alleging that there is contamination resulting from the current mining units, those issues are best addressed in the license renewal proceeding.

Further, participation by the Petitioners would not assist in developing a sound record. *See* 10 C.F.R. § 2.309(c)(1)(viii). In addressing the late-filed factors, petitioners are expected to specify the precise issues they expect to cover and summarize their proposed testimony. *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982). Here, Petitioners do not provide any factual or documentary evidence to support a link between arsenic and pancreatic cancer (the Hopkins study only discusses arsenic and diabetes). Instead, their conclusions are based only on anecdotal evidence — a personal conversation with an individual at Hills Tire in Chadron, Nebraska — of pancreatic cancer.<sup>19</sup> The Late-Filed Petition all but acknowledges that it lacks

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<sup>19</sup> *See* Affidavit of David Frankel, dated September 22, 2008. Further, there is no reason why this information — even if relevant — could not have been obtained sooner. Intervenors are expected to diligently uncover and apply all publicly available information to the prompt formulation of contentions. *See Catawba*, CLI-83-19, 17 NRC

sufficient information to support its contention. According to Petitioners, “[d]uring discovery, the parties can ascertain the exact status of these cases several of which resulted in the death of the cancer patient.” Late Filed Pet. at 4. However, the NRC’s contention rules “bar contentions where petitioners have only ‘what amounts to generalized suspicions, hoping to substantiate them later.’” *Duke Power Co. (Catawba Nuclear Station, Units 1 & 2)*, ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983).

The contention is also inadmissible under 10 C.F.R. § 2.309(f)(1). The Petitioners arguments are best characterized as unfounded speculation, which cannot form the basis for an admissible contention. See *Fansteel*, CLI-03-13, 58 NRC at 203 (“A petitioner’s issue will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits,’ but instead only ‘bare assertions and speculation.’”). As noted previously, the proposed contention is apparently based on a personal conversation between the attorney for the Consolidated Petitioners and a single individual in Chadron, Nebraska. But, there is no evidence provided in the Late-Filed Petition — anecdotal or otherwise — to suggest that arsenic poisoning has occurred. There is also no information regarding the quality or source of water consumed by the individuals with cancer. To the extent that the individuals obtain their drinking water from the City of Chadron water supply, the drinking water must meet the EPA’s drinking water standards for arsenic. To the extent that individuals obtain drinking water from private wells, there is no data presented to suggest that these wells contain arsenic.

Further, even if chronic arsenic exposure is contributing to the incidence of pancreatic cancers in Chadron, there is no evidence cited to suggest that *Crow Butte’s operations*

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at 1048. There simply is no good cause for late-filing where the information could have been identified earlier.

are causing such exposures.<sup>20</sup> In fact, groundwater in northwestern Nebraska contains naturally-high levels of arsenic.<sup>21</sup> While the wells used by Petitioners may or may not contain elevated levels of arsenic, there is simply no basis offered to support a contention that Crow Butte's operations have resulted in any arsenic contamination. A key element of the claim is therefore lacking any support, and, as a result, the claim must fail.

Another shortcoming in the Late-Filed Petition relates to the Petitioners' misleading statistical analyses. The Petitioners argue (Late-Filed Pet. at 3-4) that Chadron, with seven cases, has a pancreatic cancer rate that is much higher than the national average of 11.5 cases per 100,000 persons. However, Petitioners fail to mention that this national average refers to *new cases* diagnosed each year. In other words, there are 11.5 new cases of pancreatic cancer diagnosed each year per every 100,000 people. Persons diagnosed with pancreatic cancer, who are still alive the following year, are not counted again. Petitioners' data is not for new cases and therefore the comparison is inappropriate.

The Late-Filed Petition also fails to challenge the application. The only reference to the application in the Late-Filed Petition is an oblique reference to Section 2.9.6 (page 2-243). Late-Filed Pet. at 6. That section simply describes baseline soil sampling and briefly describes

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<sup>20</sup> For example, other factors, such as smoking, obesity, alcohol consumption, genetic makeup, and age, are known to be much greater contributors to the overall risk of diabetes, pancreatitis, or pancreatic cancer.

<sup>21</sup> *See, e.g.*, U.S. Geological Survey, National Water-Quality Assessment Program, "County map: Arsenic concentrations found in at least 25% of ground-water samples in each county" (available at [http://water.usgs.gov/nawqa/trace/pubs/geo\\_v46n11/fig2.html](http://water.usgs.gov/nawqa/trace/pubs/geo_v46n11/fig2.html)). The lead author of the study cited by Petitioners even cautions that "[p]eople who get their drinking water from private wells and live in areas where groundwater is naturally contaminated with arsenic are at an especially high risk of being exposed to water with levels above the 10 parts per billion acceptable limit set by the Environmental Protection Agency." U.S. News and World Report, "Is Your Drinking Water Giving You Diabetes?" (available at <http://health.usnews.com/articles/health/diabetes/2008/08/19/is-your-drinking-water-giving-you-diabetes.html>) (Aug. 19, 2008).

the mining process. Petitioners do not dispute any statement in the application. A contention that does not directly controvert a position taken by the applicant in the application is subject to dismissal. *See Tex. Utils. Elec. Co. (Comanche Peak Steam Electric Station, Unit 2)*, LBP-92-37, 36 NRC 370, 384 (1992).

In total, there is little substantive information to support the contention and nothing that demonstrates a possible causal nexus between the proposed amendment and arsenic exposure. The Board erred by not applying the criteria for new or amended contentions in 10 C.F.R. § 2.309(f)(2), by not addressing the late-filed factors in 10 C.F.R. § 2.309(c), and by permitting litigation of the issues raised in the late-filed contention. The Commission should reverse the Board's ruling.

C. The Commission Should Direct Use Of Subpart L Procedures

In their initial request for a hearing, the petitioners requested that the hearing be conducted under 10 C.F.R. Part 2, Subpart G, "pursuant to Section 2.310(d) ... because [its] contentions necessitate resolution of issues of material fact relating to the occurrence of past events, i.e., whether CBR disputes any of the Relevant Facts [stated by petitioners]." Petition at 4. In LBP-09-01, the Board correctly concluded that the default hearing procedures are Subpart L, but nevertheless recommended that the proceeding be conducted under the procedures in 10 C.F.R. Part 2, Subpart G. LBP-09-01 at 44-45. According to the Board, if this were a power reactor proceeding, the allegations would warrant use of Subpart G. *Id.* at 45.

Apart from the obvious fact that this is not a power reactor proceeding, the allegations here do not warrant the extraordinary step of directing Subpart G procedures even assuming that Subpart G procedures were hypothetically available. The Commission's rules of practice at 10 C.F.R. § 2.310(d) list only two criteria that would entitle a petitioner to a hearing under Subpart G procedures:

- (1) The Board finds that (a) a contention necessitates resolution of “a dispute of material fact concerning the occurrence of a past activity” *and* (b) that “the credibility of an eyewitness may reasonably be expected to be an issue” in resolving that dispute; or
- (2) A proceeding issue involves “issues of motive or intent of the party or eyewitness material to the resolution of the contested matter.”

*See Entergy Nuclear Vermont Yankee, LLC & Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-04-31, 60 NRC 686, 694-695 (2004). Here, Petitioners did not allege existence of issues that satisfy the criteria for Section 2.310(d). First, with respect to the first criterion, the Petitioners only alleged resolution of facts relating to past events — facts that are not even material to the specific license amendment request at issue.<sup>22</sup> The Petitioners did not address the second prong of that test in their request for hearing — that is, the Petitioners did not allege that the credibility of an eyewitness may be at issue. Moreover, with respect to the second criterion, the Petitioners did not assert in their petition that the proceeding involves the motive or intent of Crow Butte or eyewitnesses.

To address the Board’s rationale, Petitioners are not entitled to a Subpart G hearing because of a high degree of public interest in the proceeding (*e.g.*, because of the attendance of high school students), because an issue has been controversial in the past (*e.g.*, because one of the Petitioners unsuccessfully challenged the issuance of the original license in State courts on State law grounds *more than 15 years ago*), to provide “greater transparency,” or because discovery and cross-examination are (supposedly) required to assure public trust in the proceeding and its decisions. *See* LBP-09-01 at 45-49; *see also Vermont Yankee*, 60 NRC at

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<sup>22</sup> In their Petition, Petitioners requested use of Subpart G “because these contentions necessitate resolution of issues of material fact relating to the occurrence of past events, *i.e.*, whether CBR disputes any of the Relevant Facts stated above.” Petition at 5. They did not identify any specific event that supposedly warrant use of Subpart G procedures. Instead, the “Relevant Facts” mostly consist of a series of legal arguments and (unsupported) allegations of contamination from the site.

697. Subpart G procedures do not result in any “more complete sharing of relevant information” than the mandatory disclosure provisions of Subpart L. LBP-09-01 at 49. Indeed, mandatory disclosures arguably result in greater disclosure, since the obligation to produce relevant material is independent of any specific request.

Moreover, the mere fact that Petitioners have cast generalized aspersions on the tactics or motives of Crow Butte, its employees, and representatives cannot satisfy the “credibility” or “motive” elements of either criterion so as to trigger a Subpart G proceeding. *See Vermont Yankee*, at 700. Crow Butte fully understands its obligations under the NRC’s mandatory disclosure regulations and, obviously, will comply fully with whatever procedures the Commission deems applicable to this proceeding. Any suggestion that Crow Butte is intentionally withholding information is unsupported and misplaced. Crow Butte is not attempting to hide its ultimate ownership. Indeed, as discussed previously, the Crow Butte docket contains correspondence regarding Cameco’s purchase of Crow Butte (and the NRC’s approval). *See supra*, n.14. And, Crow Butte (not Cameco) is the licensee and also the owner and operator of the project.

Nor has Crow Butte withheld any geologic information. As the NRC Staff noted in its June 9, 2008 pleading, it addressed and resolved the concerns raised regarding alleged non-disclosures nearly 20 years ago, concluding that there had been no withholding of information.<sup>23</sup> In any event, license amendment proceedings are not a forum “to litigate historical allegations” or past events with no direct bearing on the challenged licensing action. *See Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 36 n.22 (1993).

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<sup>23</sup> *See* Ltr. from E. Hawken, NRC, to J. Peterson, dated June 23, 1989 (ADAMS Accession No. ML080740162); *see also*, Ltr. from R. Hall, NRC, to A. Ried, dated August 24, 1989 (ADAMS Accession No. 8910020257).

Petitioners have not shown how these historical events bear upon the discrete license amendment request at issue. The Commission should not permit use of Subpart G procedures premised on a general fear that a domestic licensee (with a foreign grandparent) cannot be trusted to follow regulations of any kind.

Accordingly, we urge the Commission to reject the Board's recommendation and direct the use of Subpart L procedures in this proceeding, including the Model Milestones in Appendix B that apply to Subpart L proceedings.

#### V. CONCLUSION

For the foregoing reasons, the Commission should reverse the Board's rulings regarding standing and the admissibility of Contention E in LBP-09-01, and should preclude litigation of the issues raised in the late-filed contention. Additionally, the Commission should direct that the hearing be conducted pursuant to the procedures in 10 C.F.R. Part 2, Subpart L.

/s/ signed electronically by \_\_\_\_\_  
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COUNSEL FOR CROW BUTTE  
RESOURCES, INC.

Dated at San Francisco, California  
this 6<sup>th</sup> day of February 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "CROW BUTTE RESOURCES' NOTICE OF APPEAL OF LBP-09-01" and "BRIEF IN SUPPORT OF CROW BUTTE RESOURCES' APPEAL FROM LBP-09-01" in the captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 6th day of February 2009, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

/s/ signed electronically by \_\_\_\_\_

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