

February 10, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF'S RESPONSE TO CONSOLIDATED
PETITIONERS' BRIEF RE: MISCELLANEOUS CONTENTION K

INTRODUCTION

Pursuant to the Atomic Safety and Licensing Board's ("Board") Orders of November 21, 2008¹ and January 8, 2009,² the NRC staff ("Staff") submits this response to the Consolidated Petitioners³ Brief Regarding Miscellaneous Contention K – Foreign Ownership ("Petitioners' Brief") filed on January 21, 2009.⁴ For the reasons set forth below, the Staff avers that the arguments raised by the Consolidated Petitioners regarding foreign ownership should be disregarded by the Board due to the following errors: (1) the Consolidated Petitioners mistakenly argue that there is a prohibition contained in the AEA against the foreign ownership of in situ leach recovery facilities; (2) the generic concerns Consolidated Petitioners raise regarding foreign ownership cannot upset the NRC's prior regulatory

¹ Memorandum and Order (Ruling on Hearing Requests), LBP-08-24, 67 NRC ____ (Nov. 21, 2008) (slip op. at 74-75) ("LBP-08-24" or "Order").

² Initial Scheduling Order, at 3 (Jan. 8, 2009).

³ Collectively, the Consolidated Petitioners include Beatrice Long Visitor Holy Dance, Debra White Plume, Thomas Kanatakeniate Cook, Loretta Afraid of Bear Cook, the Afraid of Bear/Cook Tiwahe, Joe American Horse, Sr., the American Horse Tiospaye, Owe Aku/Bring Back the Way, and Western Nebraska Resources Council.

⁴ Petitioners' Brief Re: Misc. Contention K – Foreign Ownership (Jan. 21, 2009) ("Petitioners' Brief").

approval of Cameco's control of Crow Butte Resources, Inc. ("CBR"); and (3) the Consolidated Petitioners' statement that the instant license renewal would authorize the export of uranium is materially incorrect.

BACKGROUND

In their petition for intervention and request for hearing,⁵ the Consolidated Petitioners tendered the following as Misc. Contention K:

Lack of Authority to Issue License to US Corporation which is 100% owned, controlled and dominated by foreign interests; voidability of mineral and real estate leases due to Nebraska Alien Ownership Act.⁶

On November 21, 2008, the Board issued its decision regarding the Consolidated Petitioners' Initial Petition, wherein, *inter alia*, the Board granted, in part, the request for hearing and petition for intervention of the Consolidated Petitioners.⁷ With regard to Misc. Contention K, the Board stated that "while there is no absolute prohibition on NRC issuing a license for an ISL mine in the U.S. to a foreign corporation," NRC regulations nonetheless "require the NRC Staff to take into consideration whether or not renewing Crow Butte's license would be inimical to the common defense and security or the public health and safety."⁸ In light of what the Board considered to be a genuine dispute of material fact between the parties, the Board admitted Consolidated Petitioners' Misc. Contention K "as it relates to foreign ownership."⁹ The Board ordered the parties to submit briefs on the merits

⁵ Request for Hearing and Petition for Leave to Intervene (July 28, 2008) ("Petition").

⁶ *Id.* at 36.

⁷ Order at 82.

⁸ *Id.* at 73-74 (*citing* 10 C.F.R. § 40.32(d)).

⁹ *Id.*

with respect to Misc. Contention K.¹⁰ On January 21, 2009, the parties submitted timely responses to the Board's November 21, 2008 Order.¹¹

In their response to the Board's November 21, 2008 Order, Consolidated Petitioners present a detailed history of the evolution of the federal government's management of foreign investments in and ownership of U.S. assets since before World War I.¹² The Consolidated Petitioners argue that if the Applicant were granted the requested license renewal, "the analysis of foreign ownership itself would be trivialized" and "[t]o do so would be to trivialize nuclear security and undermine all nuclear non-proliferation efforts."¹³ The Consolidated Petitioners further argue that the renewal of Applicant's source material license "is directly related to increased risk of proliferation of nuclear source material because it creates a legal basis to not only possess, but also to export, Uranium."¹⁴

To support their position, Consolidated Petitioners assert that "the issuance of a source materials license to a foreign controlled entity is *per se* inimical to the common defense and security of the United States" and that the "1946 [Atomic Energy] Act supports this conclusion."¹⁵ Additionally, Consolidated Petitioners assert that because Section 103 of the AEA prohibits foreign ownership, control and domination of nuclear power plants, the same should apply to source material licenses.¹⁶ In answering the Boards' second

¹⁰ *Id.* at 74-75.

¹¹ Petitioners' Brief; Applicant's Brief Regarding Miscellaneous Contention K (Jan. 21, 2009); NRC Staff's Brief in Response to Consolidated Petitioners' Miscellaneous Contention K (Jan. 21, 2009).

¹² Petitioners' Brief at 4-13.

¹³ *Id.* at 21.

¹⁴ *Id.* at 36.

¹⁵ *Id.* at 38.

¹⁶ *Id.*

question,¹⁷ the Consolidated Petitioners argue that, even in the absence of a complete bar to foreign ownership, 10 C.F.R. § 40.32(d) prevents issuance of a source material license renewal where such issuance would be “inimical to the common defense and security or to the health and safety of the public.”¹⁸ The Staff herein responds to Consolidated Petitioners’ Brief regarding Misc. Contention K.

ARGUMENT

In Consolidated Petitioners’ Brief regarding Misc. Contention K, the Consolidated Petitioners make two arguments as to why the foreign ownership of CBR is prohibited: (I) that foreign ownership of an in situ leach (“ISL”) recovery facility is *per se* prohibited by the Atomic Energy Act, and (2) that even if there is no absolute bar to foreign ownership, foreign ownership of CBR is inimical to common defense and security and public health and safety contrary to 10 C.F.R. § 40.32(d). With regard to Consolidated Petitioners’ first argument, the Staff asserts that there is no prohibition contained in the AEA against the foreign ownership of in situ leach recovery facilities. In response to the second argument, the Staff argues that the Consolidated Petitioners make the following errors: (II) the generic concerns Consolidated Petitioners raise regarding foreign ownership cannot upset the NRC’s prior regulatory approval of Cameco’s control of CBR, and (III) the Consolidated Petitioners’ statement that the instant license renewal would authorize the export of uranium is materially incorrect. The Staff’s responses to each of the Consolidated Petitioners’ arguments are discussed below.

¹⁷ The Board asked, “if there is no absolute prohibition on NRC issuing a license for an ISL mine in the U.S. to a foreign corporation, we are called upon to determine whether issuance or renewal of a source materials license would be inimical the U.S. national interest and the common defense and security.” Order at 73.

¹⁸ *Id.* at 47 (*citing* 10 C.F.R. § 40.32).

I. Foreign Ownership is Not Prohibited by the Atomic Energy Act.

In an attempt to explain why the Board should view foreign ownership as “*per se* inimical” and prohibit foreign ownership of source material, Consolidated Petitioners argue that the Board should begin by applying a Chevron analysis.¹⁹ Consolidated Petitioners argue that “Chevron requires the implementation by this Board of Congressional intentions concerning foreign ownership, control and/or domination over source material licenses.”²⁰ To support their argument that Congress intended to restrict foreign ownership of source material,²¹ Consolidated Petitioners’ argue that the Board should look to the original text of the Atomic Energy Act when it was enacted in 1946.²² Specifically, Consolidated Petitioners’ assert that “the 1946 Act demonstrates Congressional intent to restrict foreign control over source materials licenses” and reference the language of sections 1(a), 5(a)(3), 5(b), 7(c), and 10(b)(3) of the 1946 Act.²³

The Consolidated Petitioners, however, mistakenly disregard Congress’ intent in amending the Atomic Energy Act in 1954. Consolidated Petitioners’ references to the 1946 Act do not reflect current law or demonstrate Congress’ intent in amending the Act.

¹⁹ Petitioners’ Brief at 24. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). Under Chevron, judicial review of an agency’s interpretation of a statute requires a two-part inquiry. *Id.* First, the court must determine “whether Congress has directly spoken to the precise question at issue.” *Id.* In answering this question, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. If, however, the court determines that “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. In fact, the Supreme Court held that “[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.” *Id.* at 866.

²⁰ *Id.* at 25.

²¹ *Id.* at 27.

²² Petitioners’ Brief at 25-29, 38-39.

²³ *Id.*

Consolidated Petitioners emphasize section 7(c) of the 1946 Act in their legal arguments, stating that “Section 7(c) applies to bar any license from being ‘given to any person for activities which are not under or within the jurisdiction of the United States.’”²⁴ Consolidated Petitioners also assert that section 7(c) “was not amended by the 1954 Act and remains in full force and effect.”²⁵ However, the specific language of section 7(c) quoted by the Consolidated Petitioners does not appear in any provisions of the 1954 AEA, as amended, pertaining to source material.²⁶ Section 69 of the AEA presents language relevant to the Board’s decision regarding inimicality, but is significantly different than the language quoted by Consolidated Petitioners from the 1946 Act. Section 69 of the 1954 AEA, as amended, reads:

The 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 such purpose would be inimical to the common defense and security or the health and safety of the public.²⁷

Had Congress intended to restrict foreign ownership of source material, it could have done so in a manner similar to the language of section 103(d) of the AEA – which applies to nuclear power plants – wherein Congress explicitly states that “[n]o license may be issued to an alien or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign

²⁴ *Id.* at 39 (emphasis removed). Section 7(c) of the 1946 Act states, in part, that “[n]o license may be given to any person for activities which are not under or within the jurisdiction of the United States, to any foreign government, or to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security.”

²⁵ *Id.* at 27.

²⁶ See AEA § 61-69.

²⁷ AEA § 69 (emphasis added).

government.”²⁸ Congress did not, however, draft section 69 in such a way that it would be interpreted as synonymous to section 103(d). The Consolidated Petitioners’ assertion that “the 1946 Act demonstrates Congressional intent to restrict foreign control over source materials licenses” disregards Congress’ intent to treat foreign control of source material differently than nuclear power reactors. The Staff asserts that the Board should reject the Consolidated Petitioners’ arguments regarding the 1946 Act, because the NRC’s regulations are reflective of Congress’ intent in enacting the Atomic Energy Act in 1954 and its subsequent amendments which allow for issuance of a source material license to a foreign-owned entity, “if, in the opinion of the Commission,” such issuance would not be inimical to common defense and security.²⁹

As another attempt to prove that foreign ownership is *per se* inimical and should be prohibited, the Consolidated Petitioners reference and discuss a series of Commission decisions regarding the issue of foreign ownership.³⁰ However, these cases are only pertinent to the instant source material license renewal proceeding, as the Consolidated Petitioners admit, “[t]o the extent that AEA Section 103(d) and related interpretations are deemed to be relevant to foreign ownership of an Applicant for a source material license.”³¹ As noted, Section 103(d) of the AEA is not applicable to source material licenses. The Consolidated Petitioners even acknowledge such in discussing one of the example cases, *Exxon Nuclear*: “Since the NRC licenses held by Exxon Nuclear were for nuclear materials, and not for a production or utilization facility, the statutory prohibition against foreign

²⁸ AEA § 103(d).

²⁹ 10 C.F.R. § 1.1(a).

³⁰ Petitioners’ Brief at 31-34.

³¹ *Id.* at 31.

ownership, control, or domination was not involved...³² Thus, the cases cited by the Consolidated Petitioners are not relevant to the instant proceeding.

Likewise, the Consolidated Petitioners' reference to the NRC's "Standard Review Plan on Foreign Ownership, Control or Domination,"³³ is misplaced, because such is

used by the staff to analyze applications for reactor licenses, or applications for the transfer of control of such licenses, with respect to the limitations contained in sections 103 and 104 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 50.38 against issuing a license for a production or utilization facility to an alien or an entity that is owned, controlled, or dominated by foreign interests.³⁴

Again, as noted, Section 103(d) of the AEA is not applicable to source material licenses.

II. The Consolidated Petitioners' Generic Concerns Regarding Foreign Ownership Cannot Upset the NRC's Prior Regulatory Approval of Cameco's Control of CBR.

10 C.F.R. § 40.32(d) directs the NRC to evaluate whether "[t]he issuance of [a 10 C.F.R. Part 40] license will not be inimical to the common defense and security or to the health and safety of the public..." The Commission has held that the phrase "inimical to the common defense and security" refers to, among other things, "the absence of foreign control over the applicant."³⁵ With regard to inimicality, the Consolidated Petitioners raise generic concerns in their brief regarding the foreign ownership of the Applicant that could equally apply to any foreign-owned ISL facility.³⁶ However, such generic concerns cannot upset the NRC's prior regulatory approval of Cameco's control of CBR.

By letter dated May 13, 1998, in connection with its existing license, CBR notified the

³² *Id.* at 33.

³³ *Id.* at 34-35.

³⁴ Final Standard Review Plan on Foreign Ownership, Control, or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999).

³⁵ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units No. 3 and No. 4), 4 AEC 9, 12-13 (1967).

³⁶ See Petitioners' Brief at 46-51.

NRC of an upcoming change in the ownership of one of its shareholders and requested confirmation from the NRC that the notification met the requirements of 10 C.F.R. § 40.46.³⁷ In the letter, CBR informed the NRC that Cameco had agreed to purchase all of the shares of Uranerz U.S.A., which would, in effect, give Cameco a controlling interest in CBR.³⁸ By letter dated June 5, 1998, the NRC found “the proposed change in shareholder ownership to be acceptable” and thereby approved the changed in ownership.³⁹

In light of the NRC’s previous regulatory approval of Cameco’s controlling interest in CBR in connection with its existing license, the Consolidated Petitioners need to allege something more than generic issues concerning potential problems associated with regulating foreign-controlled licensees in order to present a claim of inimicality to common defense and security. If Consolidated Petitioners’ generic claims regarding foreign ownership were enough to reopen the consideration of whether Cameco’s controlling interest

³⁷ Ltr. From Stephen P. Collings, President, Crow Butte Resources, to Joseph J. Holonich, Chief, Uranium Recovery Branch, NRC at 1-3 (May 13, 1998) (ML081760219).

³⁸ *Id.* at 1-2.

³⁹ Ltr. From Joseph J. Holonich, Chief, Uranium Recovery Branch, NRC, to Stephen P. Collins, President, Crow Butte Resources (June 5, 1998) (ML081750330). The technical evaluation of the approval consisted of the following:

The NRC staff has reviewed CBR’s license transfer request against the requirements in 10 CFR Part 40, using staff guidance that addresses licensee applications involving changes in company ownership.

With the change in shareholder ownership, CBR has stated that it will maintain the same functional organization structure, responsibilities, and qualifications, as those currently in place at the Crow Butte facility. In addition, there are no planned changes in organization, facility location, equipment, current operating and emergency procedures, or personnel, as a result of this change in ownership. Records will continue to be maintained as required under NRC regulations and in SUA-1534. Also, there will be no change in the use or storage of any licensed material on site. Finally, no modification to the existing surety agreement is necessary.

Therefore, based on its review, the NRC staff has no objection to the change in shareholder ownership of CBR.

Id. at 2-3.

in CBR is inimical to common defense and security, it would have the inevitable effect of improperly disregarding the NRC's prior approval of Cameco's controlling interest in CBR without cause.⁴⁰

III. Consolidated Petitioners' Assertion that the License Renewal Proceeding would Authorize the Export of Uranium is Materially Incorrect.

The Consolidated Petitioners mistakenly assert that “[t]he renewal of SUA-1549 would allow for Applicant to continue to cause the export of Uranium by a licensed shipper as in the case of RSB Logistics.”⁴¹ As such, the Consolidated Petitioners argue that “the renewal of SUA-1549 is directly related to increased risk of proliferation of nuclear source material because it creates a legal basis to not only possess, but also to export, Uranium.”⁴² These assertions are materially incorrect. The license renewal application submitted by the Applicant would not grant it the authority to export source material if issued. A 10 C.F.R. Part 110 export licensing action is, both substantively and procedurally, a separate and distinct action from the instant matter involving a 10 C.F.R. Part 40 domestic source material license renewal application. This distinction is material because the Commission has treated the scope and nature of the evaluated risk to common defense and security as being predicated

⁴⁰ Cf. *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 463-65 (1980).

⁴¹ Petitioners' Brief at 36. CBR has been listed as a supplier on export licenses in the past. Both licenses were issued to RSB Logistic Services, Inc. License No. XSOU8798 was issued on March 5, 2004, which expired on December 31, 2008. That license authorized RSB Logistics Services, Inc. to ship natural uranium to Canada for conversion and back to the United States for further processing. Prior to that, RSB Logistics held an export license, License No. XSOU8744, which expired in 2004. Crow Butte Resources, Inc. was listed as a supplier on that license as well. However, the fact that CBR has been listed as a supplier on export licenses in the past does not disturb the fact that a Part 40 domestic source material license renewal is, both substantively and procedurally, a separate and distinct proceeding from a Part 110 export license proceeding.

⁴² *Id.* at 36.

upon the specific licensing action under review.⁴³ As this licensing of a Part 40 source material license renewal would not authorize the export of source material, risks to common defense and security by virtue of the foreign ownership of the applicant are not cognizable in the context of this license renewal.⁴⁴

CONCLUSION

In light of the foregoing, the Board should reject the arguments in Consolidated Petitioners' Brief because (1) the Consolidated Petitioners mistakenly argue that there is a prohibition contained in the AEA against the foreign ownership of in situ leach recovery facilities; (2) the generic concerns regarding foreign ownership raised by the Consolidated Petitioners cannot upset the NRC's prior regulatory approval of Cameco's control of CBR; and (3) the Consolidated Petitioners' statement that the instant license renewal would authorize the export of uranium is materially incorrect.

Respectfully submitted,

Executed in Accord with 10 CFR 2.304(d)

Christine Jochim Boote
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Mail Stop O-15 D21
Washington, DC 20555-0001
(301) 415-2756
Christine.JochimBoote@nrc.gov

Dated at Rockville, Maryland
This 10th day of February, 2009

⁴³ See *Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 165 (1995); *Kerr-McGee Corp.* (West Chicago Rare Earths Facility), CLI-82-2, 15 NRC 232, 238 n.3 (1982).

⁴⁴ See 10 C.F.R. § 40.32(d).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name: Christine Jochim Boote
Address: U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D-21
Washington, D.C. 20555
Telephone Number: (301) 415-2756
E-mail Address: Christine.JochimBoote@nrc.gov
Facsimile Number: (301) 415-3725
Admissions: State of Maryland
Name of Party: NRC Staff

Executed in Accord with 10 CFR 2.304(d)

Christine Jochim Boote
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001
(301) 415-2756
Christine.JochimBoote@nrc.gov

Dated at Rockville, Maryland
this 10th day of February 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO CONSOLIDATED PETITIONERS' BRIEF RE: MISCELLANEOUS CONTENTION K" and NOTICE OF APPEARANCE" for Christine Jochim Boote in the above captioned proceeding have been served via the Electronic Information Exchange ("EIE") this 10th 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 above captioned proceeding.

Executed in Accord with 10 CFR 2.304(d)

Christine Jochim Boote
Counsel for the NRC Staff
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15 D21
Washington, D.C. 20555-0001
(301) 415-2756
Christine.JochimBoote@nrc.gov

Dated at Rockville, Maryland
This 10th day of February, 2009